THE HIGH COURT

[2011 No. 11617P]

BETWEEN

DECLAN GANLEY

PLAINTIFF

AND

RADIO TELIFÍS ÉIREANN

DEFENDANT

JUDGMENT of Mr Justice Max Barrett delivered on 15th February, 2017.

I. Background

1. Mr Ganley is a prominent businessman. RTÉ is Ireland's national broadcaster and, at all material times, the maker of a successful current affairs television programme known as 'Prime Time'. RTÉ maintains an online presence at *www.rte.ie*. Mr Ganley maintains that in an edition of 'Prime Time' aired on 27th November, 2008, RTÉ published words that were defamatory of Mr Ganley, and that it allowed on-line access to the impugned programme thereafter. In these proceedings, Mr Ganley seeks, *inter alia*, damages, including aggravated and/or exemplary damages, for the alleged defamation.

II. The Proceedings to Date

(i) Statement of Claim delivered on 17th April 2012.

2. Mr Ganley's plenary summons issued on 15th December 2011. The statement of claim was delivered on the following 17th April. Mr Ganley alleges at para. 6 of his statement of claim that in their natural and ordinary meaning and/or by way of innuendo the words broadcast by RTÉ in the programme and on its website "*were meant and were understood to mean*" that Mr Ganley "*(a)…had links to organized crime; (b)…falsely claimed to be a paid advisor to the government of Latvia; (c)…had a direct business relationship with a [Mr] Kostas Tribecka who worked for him at a company called Anglo Adriatic; (d)…had a close friendship with [Mr] Kostas Tribecka and had associated him on a trip; (e)…was somehow involved in the death of…[Mr] Kosta Tribecka and, using the juxtaposition of pictures of the dead man's body, deliberately and shockingly shown; alongside words linking his death to the Anglo Adriatic Fund which it was alleged…* [Mr Ganley] *was behind, raised obvious suspicions* [Mr Ganley]*…was responsible for or involved in*…[Mr Tribecka's] *death*; (f) [Mr Ganley] *falsely and misleadingly claimed to have done a deal to bundle six television stations together in Central America*; (g)…[Mr Ganley's] *actions caused the Anglo Adriatic Fund to lose the life savings of thousands of Albanian pensioners* [1]…(h) [Mr Ganley]*…was covertly working for the United States' Central Intelligence Agency and/or an ill-defined group known as the 'Neocons'*". Mr Ganley further claims that: by reason of the broadcast of the words he has been gravely damaged in his character and reputation and has suffered considerable distress and embarrassment; and RTÉ, its servants or agents, were malicious in, the allegedly highly partisan tone of the programme.

[1] At the hearing of the within applications, counsel for Mr Ganley suggested (Day 1, p.16) that, inter alia, item (g) claims that Mr Ganley "*ripped off thousands of Albanian pensioners by his actions*". It appears to the court that this is not strictly correct and that while it is claimed that "[Mr Ganley's] *actions caused the Anglo Adriatic Fund to lose the life savings of thousands of Albanian pensioners*", it is not expressly claimed in item (g) that this occurred pursuant to some form of fraud or 'rip-off'.

(ii) Defence of 15th November, 2012.

3. RTÉ delivered its Defence on 15th November, 2012. It is necessary to quote elements of that Defence in some detail. At paras. 4–12, the Defence states as follows:

> "4….[Mr Ganley] *fails to identify any specific words contained in the programme which are alleged to be defamatory of* [Mr Ganley]….[Mr Ganley*] has also failed to identify or particularise any specific words which are alleged to bear each or indeed any of the alleged meanings pleaded at paragraph 6 of the Statement of Claim. Accordingly*…[RTÉ] *reserves the right to amend its defence, where appropriate, to plead justification, fair comment and/or qualified privilege as the case may be, if and when* [Mr Ganley]*…provides the necessary particulars of the specific words complained of….*[RTÉ] *further reserves the right to apply for an order striking out* [Mr Ganley's]*…claim, in whole or in part, including the meanings pleaded by* [Mr Ganley]….
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> 5. *Without prejudice to the foregoing, it is denied that the words broadcast, in their natural and ordinary meaning or by way of innuendo bore or were understood to bear any of the several meanings alleged at paragraph 6 of the Statement of Claim save for the meaning pleaded at paragraph 6(f).*[1]
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> [[1] This is an unambiguous claim of innuendo as it existed before the coming into force of the Defamation Act 2009. And it will be recalled that Mr Ganley, at para. 6 of his Statement of Claim alleges that the words used in the impugned RTÉ broadcast, whether in their natural and ordinary meaning and/or by way of innuendo bore or were understood to bear certain meanings. In essence, innuendo arises, to borrow from McMahon and Binchy's *Law of Torts* (4th ed.), para. 34-105, where "*a seemingly innocent remark may be shown to be defamatory because of a hidden significance which the uttered words bear*". The learned authors then go on to distinguish between popular innuendo (where the defamatory meaning can be construed from the words themselves) and legal innuendo (where extrinsic or additional information must be produced). In the present case, notwithstanding the pleas made, it does not appear that any innuendo is truly being claimed.]
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> *6. Insofar as the words broadcast bore the meaning pleaded at paragraph 6(f), the same were true in substance and in fact.*
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> 7. *If, which is denied, the words broadcast bore the meanings pleaded at paragraph 6(c) and 6(d) of the Statement of Claim…*[RTÉ] *denies that the said meanings are defamatory meanings as alleged or at all.*
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> *8. If, which is denied, the words broadcast bore the meanings pleaded at paragraphs 6(c) and (d) of the Statement of Claim and if, which is denied, the said meanings or either of them are defamatory, the same are*

true in substance and in fact to the extent that [Mr Ganley]*…and Mr Kosta Trebicka both worked in connection with the Anglo Adriatic Investment Fund (and were among a small number of persons engaged in doing so). The Fund itself accepted vouchers, many of which were bought on an unofficial market, but it was never allowed to invest them in privatised enterprises. People who had deposited vouchers in the Fund felt aggrieved that the Fund ceased trading with little or no explanation to depositors.*

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

10. Without prejudice to the foregoing, if, which is denied, the broadcast is defamatory of [Mr Ganley]…[RTÉ] *pleads that the sting of the words in the programme, taken as a whole, was that* [Mr Ganley]*…had a tendency to make false or exaggerated claims in respect of business or other matters. In this respect, in addition to the matters already pleaded, the Plaintiff* [presumably this means to refer to the Defendant, i.e. RTÉ] *will rely on, inter alia, the following:-*

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

(b) [Mr Ganley] *has previously made an exaggerated claim to hold a controlling interest in one of Europe's largest on-shore gas field located in the Balkans.*

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

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

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

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

(g) *In the accounts for Rivada Networks Limited filed in the Companies Registration Office* [in Ireland*] for the years 2006 and 2007, it stated that* [Mr Ganley]*…had no beneficial interest in the US parent company, Rivada Networks. When* [Mr] *Colm Keena of the Irish Times queried this assertion* [Mr Ganley]*…declined to comment. However, shortly after this interview a new set of accounts for 2007 was filed in the Companies Registration Office stating that* [Mr Ganley]*…had a 43.2 per cent interest in Rivada Networks.*

11…[RTÉ] *will rely on the provisions of section 22 of the Defamation Act 1961*.

12. *Further and in the alternative, and without prejudice to the foregoing, the words complained of were published on an occasion of qualified privilege. The programme was broadcast to profile* [Mr Ganley]*…who was then emerging as a public figure in the political arena both in this State and in Europe*….[Mr Ganley] *had, within a relatively short period of time, founded and led an organisation that had been influential in the defeat of the first referendum on the Lisbon Treaty. At the time of the broadcast*, [Mr Ganley]*…was in the process of establishing a political party and had indicated an intention to run candidates in a number of EU member states in the European Parliamentary elections in 2009. There was much public speculation about his business and financial interests, both past and present. The programme set out to investigate these issues and in so doing to give*…[Mr Ganley] *an opportunity to participate. The programme was fair, reasonable, accurate and balanced. It was measured in its content and tone*….[Mr Ganley*] and his supporters were given ample opportunity to respond to allegations and answer questions which were in the public interest. As a public service broadcaster…* [RTÉ] *had a duty to broadcast the programme and the viewers had a corresponding and legitimate interest in receiving the information and views broadcast….* [RTÉ] *reserves the right to deliver further particulars of the specific words complained of*."[2]

[2] It will be recalled from para. 6 of the Defence quoted above that RTÉ claims that "*Insofar as the words broadcast bore the meaning pleaded at paragraph 6(f), the same were true in substance and in fact*". So RTÉ denies the meanings pleaded by Mr Ganley. Part of the reason why RTÉ denies this meaning can be seen in the above-quoted para. 12 of the Defence where the plea of qualified privilege is raised. In effect, what is being claimed here is what is sometimes referred to as the '*Reynolds* Defence', a shorthand reference to the qualified privilege that can (or at least could in the past) arise in respect of discussions of political/public figures and which was the subject of some focus in *Reynolds v. Times Newspaper Ltd* [1999] 1 All ER 609 (and the perhaps more illuminating decision of the House of Lords in *Jameel v. Wall Street Journal* [2007] 1 AC 359). The court writes 'or at least could in the past' because, as counsel for RTÉ noted during the proceedings, the precise status of the '*Reynolds* Defence' as a matter of Irish law is not entirely clear. Thus as McMahon and Binchy note in *Law of Torts* (4th ed.) at para. 34.215, "*It is probable that* [the so-called '*Reynold's* Defence'] *has been overtaken by the ground of 'fair and reasonable publication', contained in* [the] *2009 Act*", specifically the defence of fair and reasonable publication (in matters of public interest) established by s.26(1) of the Defamation Act 2009 which inclines to the *Jameel* 'world-

view'.

(iii) *RTÉ's Letter of Request for Voluntary Discovery dated 20th December, 2012*.

4. RTÉ's initial letter of request for voluntary discovery issued on 20th December, 2012. A significant number of categories of discovery were sought therein and it is necessary and useful to recite them in some detail. They were as follows:

"(a) *All documents, records, notes or memoranda relating to or referring to* [Mr Ganley's]…*role in the Anglo Adriatic Investment Fund*;

(b) *All documents, records, notes or memoranda relating to or referring to the administration of Anglo Adriatic Investment Fund including but not limited to (i) records relating to the identity of persons working for the fund, (ii) the minutes of meetings held between representatives of the fund including any meetings attended by either* [Mr Ganley]…*or* [Mr*] Kosta Trebicka* (iii) *correspondence to/from or referring to*…[Mr Ganley] *and/or* [Mr] *Kosta Trebicka and* (iv) *documentation relating to the losses suffered by persons who deposited vouchers in the fund*.

Reason

It is pleaded by [Mr Ganley]…*that the words broadcast meant or were understood to mean that* [Mr Ganley]…*had a direct business relationship with* [Mr] *Kosta Trebicka who worked with him at a company called Anglo Adriatic and that this is defamatory of* [Mr Ganley]….*It is further pleaded that the words broadcast meant or were understood to mean that* [Mr Ganley]…*had a close friendship with* [Mr] *Kosta Trebicka and had accompanied him on a trip and that this was defamatory of* [Mr Ganley]….[Mr Ganley] *also claims that the words broadcast meant or were understood to mean that* [Mr Ganley's]…*actions caused the Anglo Adriatic Fund to lose the life savings of thousands of Albanian pensioners….It is pleaded by* [RTÉ]…*that if the words bore those meanings and if the meanings are defamatory of* [Mr Ganley]…*they are true in substance and in fact to the extent that* [Mr Ganley] …*and* [Mr] *Kosta Trebicka both worked in connection with the Anglo Adriatic Investment Fund and were among a small number of persons engaged in doing so. The Fund itself accepted vouchers, many of which were bought on an unofficial market, but it was never allowed to invest them in privatised enterprises. People who had deposited vouchers in the Fund felt aggrieved that the Fund ceased trading with little or no explanation to depositors.*

During the course of the interview, [Mr Ganley]…*initially denied knowing* [Mr] *Kosta Trebicka. However, when details of* [RTÉ's]…*investigation were put to*…[Mr Ganley], *this was qualified by* [Mr Ganley]…*through a spokesman who said that* [Mr Ganley]…*'can say with absolute certainty that he never had any significant relationship with Mr Trebicka. He now acknowledges that Mr Trebicka had an association with Anglo Adriatic but said that neither he nor his brother Sean can recall ever meeting him'. Similarly, when, during the programme, it was suggested to* [Mr Ganley]…*that there was an informal trade in bonds and that people lost their savings,* [Mr Ganley]…*replied 'OK. Well that's news to me'. Discovery of the above categories of documents are necessary and relevant to the question of liability. The discovery is sought for the purpose of advancing the existing plea of justification. It is submitted that it will advance*…[RTÉ's] *case and undermine* [Mr Ganley's]…*claims in respect of his knowledge of Mr Trebicka and the Fund itself. The documentation will show* [Mr Ganley's]…*precise role in Anglo Adriatic Investment Fund, his relationship with others working with the Fund including Mr Trebicka and the true extent of his involvement and knowledge in respect of the Fund's activities and true extent of his knowledge of the losses suffered by Albanian people as a result of the Fund's activities.*

(c) *All documents, records, notes or memoranda relating to or referring to* [Mr Ganley's]…*role, vis-à-vis the Latvian Government in the early stages of Latvian independence….*

(d) *All documents, records, notes or memoranda relating to or referring to* [Mr Ganley's]…*application to the Ministry of Finance in Latvia in respect of Ganley International Bank….*

(e) *All documents, records, notes or memoranda relating to or referring to* [Mr Ganley's]…*controlling interest in one of Europe's largest on-shore gas fields located in the Balkans.*

Reason

[RTÉ]…*pleads that if the broadcast is defamatory of* [Mr Ganley]…*which is denied, the sting of the words, taken as a whole, was that* [Mr Ganley]…*had a tendency to make false or exaggerated claims in respect of business or other matters.* [RTÉ]…*will rely on the matters pleaded in the Defence including, inter alia, that in or around 1998* [Mr Ganley]…*had previously made an exaggerated claim to hold a controlling interest in one of Europe's largest on-shore gas fields located in the Balkans. Discovery of the above category of documents is necessary and relevant to the question of liability and is sought for the purpose of advancing* [RTÉ's]…*claim of justification. It will advance*…[RTÉ's] *case that* [Mr Ganley]…*has made false and exaggerated claims. The documentation, or lack thereof, will demonstrate that the claim made by* [Mr Ganley]…*that he held a controlling interest in one of Europe's largest on-shore gas fields in* [the] *Balkans was, in fact, false or exaggerated. In circumstances where* [Mr Ganley] …*has made these claims but never provided any specific detail, the only means that* [RTÉ]…*can obtain this information is from* [Mr Ganley]…*and* [RTÉ] *would be placed at a severe evidential disadvantage if it was deprived access to this documentation in advance of trial*.

(f) *All documents, records, notes or memoranda relating to or referring to* [Mr Ganley's]…*role as an advisor on technology and terrorism to the Club de Madrid group of international heads of government*.

Reason

[RTÉ]…*pleads that if the broadcast is defamatory of* [Mr Ganley]…*which is denied, the sting of the words, taken as a whole, was that* [Mr Ganley]…*had a tendency to make false or exaggerated claims in respect of business or other matters*. [RTÉ]…*will rely on the matters pleaded in the Defence including, inter alia*, [Mr Ganley] *has previously made an exaggerated claim that he was an advisor on technology and terrorism to the Club De Madrid group of international heads of government whereas he had in fact participated in a summit in 2005 and was a member of the ad hoc working group on science and technology that shared its conclusions in the related session of the summit. Discovery of the above category of documents is necessary and relevant and is sought for the*

purpose of advancing the plea of justification. The documentation, or lack thereof, will demonstrate that the claim made by [Mr Ganley]…*was in fact false or exaggerated and at the time of making the claim* [RTÉ]…*knew that was the case.*

(g) *All documents, records, notes or memoranda relating to or referring to* [Mr Ganley's]…*interest in the contract for a telecommunications network in Iraq in 2004 including but not limited to all documentation in respect of the cancellation/termination/withdrawal by the Coalition Provisional Authority in Iraq in March 2004.*

Reason

[RTÉ]…*pleads that if the broadcast is defamatory of* [Mr Ganley]…*which is denied, the sting of the words, taken as a whole, was that* [Mr Ganley]…*had a tendency to make false or exaggerated claims in respect of business or other matters.* [RTÉ]…*will rely on the matters pleaded in the Defence including, inter alia, that in May 2004* [Mr Ganley]…*specifically claimed to be the beneficiary of an impending $70 million contract for a telecommunications network in Iraq when in fact he knew that any contract which it had been thought might be given to a company controlled by or partly controlled by* [Mr Ganley]…*had been cancelled in March 2004. Furthermore, it is pleaded that* [Mr Ganley]…*has falsely claimed that it was he who had caused his company to withdraw from the said contract when it was in fact withdrawn by the Coalition Provisional Authority in Iraq, despite the threats and protests of persons in association with whom* [Mr Ganley]…*was seeking to be awarded the said contract, because an inappropriate term had been inserted in it allowing for the building of an infrastructure for a fourth cellular phone network in Iraq….*

(h) *All declarations made by or on behalf of* [Mr Ganley]…*in respect of his nationality in respect of his business interests and the companies of which he is or was listed as a director.*

Reason

[RTÉ]…*pleads that if the broadcast is defamatory of* [Mr Ganley]…*which is denied, the sting of the words, taken as a whole, was that* [Mr Ganley]…*had a tendency to make false or exaggerated claims in respect of business or other matters*. [RTÉ]…*will rely on the matters pleaded in the Defence, including, inter alia, that in September 2009, during a debate with the then Minister for State, Dick Roche, on RTÉ Radio One 'News at One'* [Mr Ganley] …*was asked why in respect of some of his companies he registered himself as a British citizen when it suited him*. [Mr Ganley]…*replied that he had 'never done that'*. [RTÉ] *has had sight of records in UK Companies House which show that in 1995 Ganley International was registered, listing* [Mr Ganley]…*as a director and his nationality as 'British'. Subsequent handwritten entries in 2001 and in 2002 also list* [Mr Ganley's]…*nationality as 'British'. These particular records were only changed to reflect* [Mr Ganley's]…*nationality as 'Irish' in 2006….*

(i) *All documents, records, notes or memoranda relating to* [Mr Ganley's]…*interest in the US Company Rivada Networkd prior to 2007.*

Reason

[RTÉ] *pleads that if the broadcast is defamatory of* [Mr Ganley]…*which is denied, the sting of the words, taken as a whole, was that* [Mr Ganley] *had a tendency to make false or exaggerated claims in respect of business or other matters.* [RTÉ]…*will rely on the matters pleaded in the Defence including, inter alia, that in the accounts for Rivada Networks Limited filed in the Companies Registration Office for the years 2006 and 2007, it stated that* [Mr Ganley] …*had no interest in the US parent company, Rivada Networks".*

(iv) *Replies of 23rd April, 2013 to Notice for Particulars of 4th July, 2012.*

5. In a notice for particulars of 4th July, 2012, RTÉ sought, *inter alia*, a precise indication of the words in the impugned television programme that are alleged to be defamatory of Mr Ganley and also full and detailed particulars in the innuendo pleaded in para. 6 of the Statement of Claim. In the Replies of 23rd April, 2013, to the notice for particulars, indicated, *inter alia*, that he is claiming that "*the programme in its totality was defamatory of* [Mr Ganley]", further adding as follows in respect of the claim of innuendo:

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

(v) Reply to Defence delivered on 23rd April, 2013.

6. In a Reply to Defence delivered on 23rd April, 2013, one finds an issue beginning to rear its head that has been the subject of some focus during the hearing of the within applications, being what allegations a defendant may seek to the truth of in support of a plea of justification. Thus, at paras. 2–3 of the Reply, Mr Ganley states as follows:

"2. *In response to paragraphs 8, 9 and 10 of* [RTÉ's]…*Defence* [quoted above], [Mr Ganley]…*contends that the alleged facts (which are denied) pleaded in those paragraphs do not sustain or support a plea of justification.*

3…[RTÉ] *is not entitled to seek to prove the truth of the allegations at paragraph[s] 8, 9 and 10 of its Defence, in support of a plea of justification of meanings which*…[Mr Ganley] *has not pleaded."*

7. This issue again emerges in a letter of 4th August, 2014 from Mr Ganley's solicitors to RTÉ's in-house solicitors which states, *inter alia*, as follows:

"*We note that you are seeking clarification as to whether* [Mr Ganley]…*is denying making the statements pleaded at paragraphs 9 and 10 of*…[RTÉ's] *Defence, or whether he admits to having made the statement but denies that*

they are false or exaggerated.

We would advise that the question of whether [Mr Ganley]*…denies making the statements or admits making them but denies that they are false or exaggerated is irrelevant….*[RTÉ] *is not entitled to refer to other alleged facts concerning* [Mr Ganley]*…about matters which are entirely unrelated to the allegations contained within* [RTÉ's] *…'Prime Time' programme to support a plea of justification….*[RTÉ] *can only maintain the plea of justification if it successfully proves the truth of the allegations the subject-matter of the proceedings*."

(vi) Mr Ganley's First Affidavit of Discovery Sworn on 27th August, 2014.

8. Mr Ganley's first affidavit of discovery was sworn on 27th August, 2014. RTÉ later pointed, in a letter of 8th December, 2014, to what it contended were a number of deficiencies in this affidavit of discovery.

9. First, in the First Schedule, Part 1, the affidavit merely recited a list of documents without indicating which documents related to which category of discovery, with the result, RTÉ claimed, that it was unable to assess properly the completeness or otherwise of the discovery made.

10. Second, in the First Schedule, Part 2, the affidavit referred to generic categories of documents over which privilege was being claimed, rather than listing the relevant documents.

11. Third, in the Second Schedule, Part 1, RTÉ contended that what it considered were the relatively small number of documents being made available to it via discovery suggested that Mr Ganley's businesses and activities had largely been run on an almost entirely oral basis.

(vii) The Order for Discovery of 4th February, 2015.

12. Pursuant to a notice of motion of 5th December, 2014, the High Court ordered, on consent, that RTÉ within eight weeks make discovery of various categories to Mr Ganley.

(viii) Mr Ganley's Second Affidavit of Discovery Sworn on 10th April, 2015.

13. On 10th April, 2015, Mr Ganley swore a second affidavit of discovery. This time the First Schedule, Part 1, listed the various documents referred to therein on a per category basis. The First Schedule, Part 2 again identified privileged documentation on a generic basis. The Second Schedule, Part 1 again appeared, at least to RTÉ, to be notably brief, though it now also indicated that "*Electronic files stored on my* [Mr Ganley's] *computer system relating to the telecommunications network in Iraq which were wiped from my system on or about 2008*." This second affidavit of discovery elicited the following response from RTÉ to Mr Ganley's solicitors by letter of 21st April, 2015:

"…We are now reviewing your recent Affidavit. Confusingly it is also headed 'Affidavit of Discovery' as though an Affidavit of Discovery had not been filed and served before this one. We are in the process of examining what is in fact a supplemental Affidavit of Discovery and not an original Affidavit of Discovery to ascertain the significance of the differences between the two, if any.

To be absolutely clear, we take it from the most recent Affidavit being titled 'Affidavit of Discovery', that you acknowledge that out complaints about your original Affidavit were well-founded….In the circumstances, we have had your recent 'real' Affidavit of Discovery…for less than one week. We must have time to read it and consider its contents….

Since our request for discovery was made prior to your request for discovery, we believe we are entitled to undertake this exercise before finalising our own Affidavit, and making our documentation available for inspection…. [1]

*We do not wish to make any inappropriate allegations in relation to the earlier deficiencies in your Affidavit of Discovery. For this reason, we refrain from making any comments in relation to substance until such time as our client has had an opportunity to review the documents fully. We appreciate that our obligation to make discovery is not affected by any knowledge of the documents which you intend to discover, but this is an obligation which works both ways and we are anxious to ensure the process is completed properly by both [*RTÉ and Mr Ganley*]".*

[1] This assertion has no basis in law. RTÉ was under a separate obligation to comply with the High Court order for discovery. That obligation was not dependent on the quality of discovery being made by Mr Ganley.

14. By 29th April, 2015, RTÉ had enjoyed the opportunity to consider more fully the Second Affidavit of Discovery sworn by Mr Ganley. Again, it had various queries concerning the adequacy of Mr Ganley's discovery. So, for example, it noted that Mr Ganley appeared to have skipped categories (b), (h) and (i) of the requested documentation and sought "*urgent written confirmation that* [Mr Ganley]*…is unequivocally stating on oath that he does not now, nor did he ever have, in his power, procurement or possession in any form* (including electronic): *(b) any documents, records, notes or memoranda relating to or referring to the administration of Anglo Adriatic Investment Fund…any documents, records, notes or memoranda relating to* [Mr Ganley's]*…declaration of nationality for companies of which* [Mr Ganley]*…has formed or is listed as a director….(i) any documents, records, notes or memoranda relating to* [Mr Ganley's]*…interest in the US company Rivada Networks prior to 2007*."

15. RTÉ also pointed to what it claimed were various gaps in such documents as had been provided. It complained again about the limited substance of the First Schedule, Part 2, and the Second Schedule. And it also sought an explanation of "*how it is that electronic files stored on* [Mr Ganley's] *computer system relating to the telecommunications network in Iraq were 'wiped from the system' in or around 2008*. [Mr Ganley]*…might explain how it is that only electronic files relating to* [the] *telecommunications network in Iraq and none of the other categories were 'wiped' if that is in…fact the case and furthermore, how it is that a person such as your client did not have the system backed up. It is all the more surprising that these electronic files are the ones that are missing given the controversy surrounding the project*."

16. RTÉ then continued by suggesting that given what it perceives to be Mr Ganley's "*deficient*" discovery, notwithstanding two affidavits of discovery, and despite its acceptance that each side's obligation to discovery was "*separate and independent of the other's*", it proposed, in circumstances where its discovery was "*all but complete*", that it would lodge its affidavit of discovery (with

schedules) in court but without providing the schedules to Mr Ganley's solicitors "*until such time as the issues regarding* [Mr Ganley's] …*affidavit of discovery have been resolved by the Court, or otherwise*". This letter also indicated RTÉ's intention, if matters were not resolved to its satisfaction within 14 days of its letter, it would proceed to issue a motion for leave to cross-examine Mr Ganley and/or seeking to strike out Mr Ganley's claim; these are among the applications now before this Court.

17. What had Mr Ganley to say, via his solicitors as to the allegations being made regarding the adequacy of his discovery thus far? In letters of 1st and 5th May, 2015, Mr Ganley's solicitors vigorously rejected all of RTÉ's allegations as to any inadequacies or improprieties presenting in the discovery process, and disputing whether an order for cross-examination on an affidavit of discovery was a relief that was available to RTÉ. This last aspect of matters is addressed later below. It suffices now to recite a portion of the letter of 1st May so as to give a full sense of the view being taken of how matters stood from the perspective of Mr Ganley and his counsel:

> "*We refer to your letter dated 29th April regarding our client's Affidavits of Discovery*.
>
> *We will deal with the various, and somewhat pedantic, procedural points you have raised in relation to the formatting of our Schedule of Documents.[1] In the meantime, we would express our serious concern, and indeed bewilderment, at what appears to be a brazen attempt to delay the prosecution of this case.*
>
> [1] In fairness to RTÉ, it was by this point dealing with a plaintiff who had sworn a first affidavit of discovery that was deficient, a second affidavit of discovery that made casual mention of the wiping of the Iraq-related files (and, as later proved to be the case, inaccurately so), each of which affidavits seemed and seem to contain a notably limited number of documents given the breadth of discovery sought by RTÉ. So to describe RTÉ's concerns as "*pedantic, procedural points*" is not an accurate depiction that real and substantive concerns were being raised, or at least were also being raised, by it.
>
> *Our client* [Mr Ganley] *has made it clear from the outset that he is more than willing to provide any and all documentation required of him, whether or not it is relevant or properly discoverable, with a view to getting his case into Court at the earliest possible opportunity*.
>
> *You were put on notice a considerable time ago that the Discovery documentation was available for inspection at our office and you failed to avail of the opportunity to review same. With a view to attempting to progress the matter, and on the basis that* [RTÉ]…*would reciprocate and provide us with copies of its Discovery, we arranged to courier to your office a full copy of* [Mr Ganley's]…*Discovery documents on 2nd April. Instead of providing the Defendant's Discovery as per the Order, and as agreed, you have taken the somewhat puzzling and possibly unprecedented, step of holding back not only your Schedule of Documents but also the three boxes of documentation that you had previously informed us would be imminently available for inspection. Your reasons for reneging on your confirmation that you will be providing access to these documents in accordance with the Court Order we have already obtained are as unclear as the situation is unacceptable.*
>
> *While you appear to be inferring that our client is deliberately withholding or concealing information, which he would vigorously and categorically deny, it is in fact your conduct in failing to comply with the Order of the Court that should be a cause for concern.*
>
> *We can only come to the conclusion that you are either deliberately introducing procedural obstacles in order to delay the hearing of this Action or that it is RTÉ who have something to hide in their documentation, or lack of it?*
>
> *….[W]e would repeat that out client is more than willing to provide any reasonable assistance over and above the Discovery process in order to prevent RTÉ delaying a hearing on the merits, particularly as the subject Prime Time broadcast remains accessible online. Our client has absolutely nothing to hide despite your efforts to infer otherwise.*
>
> *You will of course have the opportunity to cross-examine out client in the witness box at the substantive Hearing, and therefore we would invite you to support an application to the Court to have this action listed for Hearing during the week commencing 22nd June, and that both parties co-operate and work together to ensure that all appropriate documentation is made available in order to avoid any unnecessary burden on the Court's time.*
>
> *In this regard, we remain open to any reasonable proposals, but we would repeat that the first step ought to be the mutual disclosure and inspection of the documentation that both parties have indicated is now readily available."*

(ix) Mr Ganley's Third Affidavit of Discovery Sworn on 24th July, 2015.

18. In a supplementary affidavit of discovery sworn by Mr Ganley on 24th July, 2015, Mr Ganley, inter alia, offered an explanation for the general absence of documentation in relation to the Anglo Adriatic Fund in the documentation discovered thus far, provided further detail as to how he had come to lose the Iraq-related computer files, and provided copies of certain further documentation that had lately come into his possession.

19. With regard to the Albanian documentation, Mr Ganley indicated as follows:

> *"[I]n or around 1997 and the period following, a significant number of files relating to the Anglo Adriatic Fund were lost as a result of the anarchy and looting which followed the outbreak of civil disorder in Albania and which resulted in the specific looting and destruction of Anglo Adriatic property and the airlift evacuation of Anglo Adriatic's expat staff from Albania by the multinational intervention force that came into Albania to help restore order. Given the passage of time since that date, I am not in a position to identify and individually list each and every document in this regard. I further say and believe that it is possible that additional records relating to the fund may remain in the possession of former employees, consultants and/or agents of the fund. However, if this is the case, despite my best efforts, I say and believe that any such documents are not in my power, possession or procurement".[1]*
>
> [1] The court notes that none of the "*former employees, consultants and/or agents*" is identified, that no detail as to the "*best efforts*" is provided and that there is a remarkable looseness to the phrase *"[I]n or around 1997*" –

such documentation as has been placed before the court suggests that things 'got bad' for the Fund in Albania sometime around March 1997 but were back on an even keel by November of that year. There is in any event a certain unreality to the suggestion that even widespread civil disorder in Albania would have led to the complete disappearance of documentation relevant to the discovery process. Counsel for RTÉ referred the court, when at hearing, to a document provided in the discovery process which sets out an overview of the Anglo Adriatic Fund and states, inter alia, "*The Fund started the voucher collection process in August 1996. It opened collection centres at branches of the Savings Bank of Albania….Collection centres were set up in Tirana, Durres* [and other metropolitan areas in Albania*]….In processing and administering the voucher collection, staff were trained by the Albania America Enterprise Fund. The staff were employed by the Savings Bank of Albania to assist the bank….Proper day-to-day reporting and management structures are in place to ensure that both record keeping and security procedures are in order*". This would suggest a relatively dispersed operational structure, an attack on one or more parts of which would still leave others intact, and the records therefrom still available.

20. With regard to the Iraq-related documentation, Mr Ganley explained matters as follows:

> *"In my Affidavit of Discovery sworn on 10th April 2015, I averred that certain discoverable electronic documents were wiped from a computer system in 2008. In fact, I have now established that documents were wiped from the system not in 2008 but in 2004 and 2005. Specifically, I say and believe that in or around August 2004, the hard drive of the computer belonging to my personal assistant became corrupted and again all of [the] material for the previous year was lost. On both occasions specialist IT consultants were retained to repair…[my personal assistant's] computer, but unfortunately, all the material contained on her hard drive was irretrievably lost. I say and believe that some material coming within category (g) was contained on…[my personal assistant's computer] hard drive as a consequence, is no longer accessible. At this remove, given the passage of time since this occurred, I am not in a position to identify or individually list what documentation coming within category (g) was lost."*

21. The court cannot but note in passing that the events described by Mr Ganley in the last two segments of quoted text are each sufficiently memorable in nature, viz. a loss of files as a result of looting following on a temporary breakdown in civil order in Albania, and the complete wiping of files from a computer (an event of no little significance in the commercial life of any enterprise) that it is difficult to believe that when Mr Ganley approached his first affidavit of discovery, and was focusing so intensely on the events of the past so as to ensure that he complied with his obligations, did not recall or did not think it appropriate to mention why events that would almost certainly yield gaping omissions in the documentation of which he was to make discovery. Moreover, the court must admit to some scepticism that all of the documentation relating to a bid for a telecommunications licence would be contained on the computer of Mr Ganley's personal assistant only. Were there no e-mails sent by him to her or *vice versa* containing text or attachments of relevance? And can it be that not a single copy of any such e-mail and/or attachment (whether as an attachment or as a saved file) exists on the hard disk of a computer belonging to, or is otherwise preserved, electronically or otherwise, by, for example, Rivada or Ganley International? It just does not ring true of the operations of any commercial enterprise of substance in our Electronic Age that there would be such limited availability of documentation that the loss of saved material on a single hard-disk would mean that all copies of that saved material had thereby been lost forever. The usual problem these days is the reverse: there are so many e-mails that have a nearly identical sequence of previous e-mails recited in the text beneath them and/or which attach the same or slightly variant versions of documents that it is excising replicates from the bundle of documents for eventual use, not finding such replicates, that is often a key challenge in the discovery process.

22. Two further letters written by RTÉ's in-house solicitors to Mr Ganley's solicitors add some further colour to the picture presenting as of end-2015/early-2016, at least so far as RTÉ then perceived matters to be. Thus in a letter of 1st December, 2015, RTÉ writes, *inter alia*, as follows:

> *"We have received your letter dated 11th November…with some surprise. While it would ordinarily be customary to give you Discovery and documentation as soon as we had complied with our obligations, you know that the reason we are not doing so is the very matter to be argued on our Motion* [now before this Court]*….We have made it clear that we consider your client's supposed 'extensive searches of voluminous documentation' to have resulted in Discovery which is inadequate in the grossest possible ways.*
>
> *As you know the obligation to Discover is one which falls upon the Plaintiff but it is up to you to bring home to him its extent. You know, for example, although you have left out of your Discovery, the more particular Second Part of Category G from the description in your Affidavit, that the circumstances in which the Plaintiff's Iraqi involvement came to an end are of particular importance. Although your client Discovers some very general material, for example, dating from 2003, you produce only six documents dating from 2004 during which most of the relevant events took place. We know, and so does your client, that there were and are many more documents relating to the 2004 matter and you will be well aware from the reasons given for seeking Discovery in the first place what kind of documents must be pertinent. We would go on to say that those that your client has Discovered appear to be a meagre selection of general documents which he hopes might contain some comments might be considered favourable to him. He has clearly made no serious attempt to grapple with the matter.*
>
> *We cite this only as an example. His Discovery is gravely deficient, we suspect in every category in which he has made it. The mere fact that the Plaintiff may consider the Discovery onerous or perhaps even unhelpful to his case is not a basis for a failure to make it.*
>
> *We first asked you for Discovery on 20 December 2012. It is now December, 2015 and your client still has not addressed it properly. While our position is not that simplistic, this cade involves your client's involvement in a large investment fund in Albania, his role as an alleged advisor to the Latvian government in the 1990s, his proposal allegedly to set up a bank, his controlling interest in one of Europe's largest onshore gas fields, his effort to become involve in a national telecommunications network in Iraq and various other matters. Are we seriously to believe that even in the most extraordinarily [presumably 'extraordinary'] circumstances such enterprises between them could generate a total of 509 documents over a space of many years. We exclude from the Schedule in your Affidavit of Discovery the 108 documents which are alleged to comprise all documents, records, notes and memoranda regarding an interest in six television stations in Central America because we never asked for any Discovery in this category despite the fact that you have made it.*
>
> *We would add that we had in the most recent Affidavit got sketchy details of the alleged disappearance of records owing to the corruption of your client's personal assistant's computer. We are amazed that between your Affidavit*

of Discovery in April 2014 and that sworn in July, you allegedly realised that such a cataclysmic event happened not in 2008 but in 2004 and 2005. We cannot imagine how anyone could possibly get such a thing wrong and we note also that no indication of any kind was given as to the detailed nature of the Iraqi documents alleged to have been lost or of any efforts at any time since to retrieve them. In addition it is now claimed that Anglo Adriatic Fund documents were destroyed by damp\mildew 'in or around the early 2000s' again no details are given just as none are given in relation to the alleged loss of documents of a similar nature in 1996 to 1997.

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

We are as anxious as you to bring this case to Trial, but it must be done fairly."

23. It is difficult to imagine a better example of 'Do as I say, not as I do' than that contained in the above-quoted text. RTÉ complains about Mr Ganley's perceived want of compliance with his discovery obligations, and even presumes to take his solicitors to task as to their role as regards ensuring Mr Ganley's compliance with those discovery obligations, at a time when RTÉ itself has completely, and deliberately, failed to comply with its own obligations, pursuant to court order, to make discovery to Mr Ganley. Absent unusual or mitigating circumstances, courts generally take a dim view of non-compliance by a party with a court order, sometimes going so far as to reflect their displeasure in a costs order, sometimes otherwise, sometimes both.

24. In its letter of 27th January, 2016, RTÉ puts beyond doubt the approach that it is adopting, stating "*[W]e believe that we have an entitlement to cross-examine your client on the deficiencies in his Discovery. We have made it plain that if your client knows what documents we have which lead us to this conclusion, he will be in a position to tailor his Discovery, as we believe that he has already done, to serve his own ends. For this reason we will not undercut the rationale of our own Motion by giving your client any part of our Discovery at this juncture so we can aid him in the process*" – notwithstanding that there was at the time a court order in place requiring that the discovery which was being refused ought to be made and was required to be made. In this regard, the court found the following exchange, at hearing, between court and counsel for RTÉ to be informative (Day 2, p.103):

"Judge: [C]ould I just ask one question? Usually you would expect somebody like the defendant coming into court and saying 'I have done everything right and they haven't, so will you please give me the order?' But you are coming into court and saying 'I have done everything right to a point', aren't you…?

Counsel: Well that is true and I have said why.

Judge: Yes.

Counsel: And I have attempted to lodge the papers in court so that the process is frozen.

Judge: Yes. But is that a relevant factor for me to bear in mind?

Counsel: Well I say yes, just to the extent that the jurisdiction of the court in the matter is as flexible as the requirements of justice require. I say the remedy for a failure to make discovery is primarily to ensure that discovery is then made. I say that I am spiritually, so to speak, clear…when I said that I was going to seek to put the matters into court but not to give them to the other side yet and to ask the court…to vary its order so that until…the Plaintiff was prepared to make proper discovery, that I shouldn't have to inform the Defendant."

25. While the court agrees that the remedy for a failure to make discovery ought generally to be that the court thereafter seeks to ensure that full and proper discovery is made, the court cannot but note that neither in the above exchange nor otherwise at hearing, nor in the submissions or other documentation placed before the court, has RTÉ assuaged the concern prompted in the court by the fact that RTÉ comes to court at this time seeking the full benefit of such discovery as has been agreed while at the same time denying, and hoping for a time to continue to deny, to Mr Ganley, such discovery as RTÉ has been ordered to make. Such an approach cannot stand. Just as a party who comes to equity must come with clean hands, so too, by analogy, a party who comes to court seeking a discretionary relief which will better ensure that right be done to him by another must expect as the quid pro quo exacted by the court for the granting of such discretionary relief that he must do right by that other. To use a colloquial phrase, RTÉ cannot 'have its cake and eat it'; if it wishes to get justice it must also do right.

(x) Affidavit of Ms Trish Whelan, Solicitor, RTÉ, of 29th January, 2016.

26. Parties often complain about some aspect of the discovery being made by the other side. Parties may sometimes harbour suspicions that they have not been provided with relevant material by the other side. But discovery, being a human process, is inherently likely to be a somewhat flawed process, and courts are conscious of that constant reality. As this Court noted at para. 11 of its judgment last year in *Ryanair Limited v. Van Zwol and ors* [2016] IEHC 264, where, *inter alia*, complaint was made that documents were discovered by way of a third affidavit of discovery which, it was contended, ought to have been discovered by way of a first affidavit of discovery:

"*Even the most scrupulous of discovery processes – and no little scruple is required in the discovery process – likely involve some element of inbuilt error. Discovery is a means to an end, not an exercise in perfection*."

27. Counsel for RTÉ indicated agreement with the last-quoted observation at hearing and insisted that what RTÉ is about in this case is not the pursuit of perfection. RTÉ just does not consider that it is getting anything approaching the level of discovery that it considers would render the main trial of the within proceedings to be a fair meeting of arms. However, even with the various deficiencies that the court has referred to above as regards Mr Ganley's approach to discovery thus far, and it has flagged some significant deficiencies, it places no little premium on the fact that Mr Ganley has sworn on affidavit what he can and cannot provide by way of discovery. Swearing to matters in court proceedings is never a matter lightly to be approached and the court's general experience is that it is not lightly approached because people know that trouble can ensue for them from deliberately swearing to something that is false. Moreover, as counsel for RTÉ acknowledged at hearing, there will often be some 'to-ing and fro-ing' in a discovery process as fresh documentation comes to light or is remembered or is belatedly realised to come within the scope of what it has been agreed or ordered shall be discovered; and nobody complains about that because in truth there is nothing to be complained about. But what has tipped the balance and inclined the court to the view that proper discovery has not been made by Mr Ganley to this point of documentation which must be known to him and which is in his power or possession, is the evidence of Ms Trish Whelan, a solicitor for RTÉ, in an affidavit sworn by her on 29th January, 2016. The relevant segment of her affidavit commences at para. 28

and reads as follows:

> "28. *It has already been made clear in* [RTÉ's]*…correspondence and Affidavits that* [RTÉ's]*…great concern is that if* [Mr Ganley]*…knows before he is obliged to meet his Discovery obligations properly, what documents* [Mr Ganley] *…has in its possession, he can then tailor his own Discovery to avoid the revelation that he is concealing documents while simultaneously obviating the risk that he might have to give* [RTÉ]*…documents while simultaneously obviating the risk that he might have to give to* [RTÉ]*…damaging documents which he does not already have. This is a particularly critical issue in a case where because nearly all events happened outside the jurisdiction,* [RTÉ]*…can often neither seek Third Party Discovery, nor Subpoena witnesses. It is for this reason that* [RTÉ]*…is particularly reluctant to reveal the Schedule to its Affidavit of Discovery before* [Mr Ganley]*…has been compelled by this Honourable Court properly to meet his Discovery obligations*.
>
> 29. *It is therefore with extreme reluctance that* [RTÉ]*…exhibits one document in order to illustrate why it is so important that* [RTÉ]*…be permitted to cross-examine* [Mr Ganley]*…on his Discovery in default of his proceedings being struck out. On 13 July 2004 on* [Mr Ganley's] *instructions, the firm of Addleshaw Goddard Solicitors* [a prominent London law firm]*…wrote a letter to John Carroll, Esq., the Editor, Los Angeles Times, on behalf of Mr Ganley threatening proceedings in respect of two articles written by one of their Journalists, T Christian Millar on 29 April 2004 and 7 June 2004. Each of those related to matters central to Discovery category (g) ["All documents, records, notes or memoranda relating to or referring to* [Mr Ganley's]*…interest in the contract for a telecommunications network in Iraq in 2004 including but not limited to all documentation in respect of the cancellation/termination/withdrawal by the Coalition Provisional Authority in Iraq in March 2004"]*".

28. Ms Whelan appends a copy of the letter to her affidavit. The court returns to the text of her affidavit later below. However, it is worth quoting in some detail the text of that letter. It is a substantial and detailed text which makes clear that Mr Ganley and certain associated persons were very aggrieved by what they considered to be the defamatory material that had been published in respect of them in the Los Angeles Times. The letter is written on the headed notepaper of Addleshaw Goddard, Solicitors, and states, inter alia, as follows:

> *"Dear Sir*
>
> *Declan Ganley, Liberty Mobile and Guardian Net*
>
> *We have been consulted by Declan Ganley, Liberty Mobile and Guardian Net in connection with two articles written by your staff writer, T Christian Miller and published by the Los Angeles Times. The first, entitled 'Iraq: Cellular Project leads to US Inquiry' was published on 29 April 2004 and the second, entitled 'Pentagon Deputy's Probes in Iraq Weren't Authorized, Officials Say' on 7 June 2004 ('the articles'). The articles contain a great many inaccuracies and are seriously defamatory of our clients.*
>
> *Our clients are well known and highly regarded in the telecommunications sector, both in the UK and internationally. The articles are published in this country [the United Kingdom] on the Los Angeles Times' website at www.latimes.com and the first article is also published on www.corpwatch.org under the section 'War Profiteers'.*
>
> *In a nutshell, the articles implicate our clients in the allegedly corrupt behaviour of John A Shaw, the Pentagon's Deputy Under Secretary of Defense for International Technology Security, in connection with the award of contracts in Iraq following the war. They claim that Mr Shaw is being investigated by the FBI. The articles repeatedly name our clients in connection with the activities which they claim are the subject of the investigation and suggest very strong ties between our clients and Mr Shaw thereby tarring our clients with the same brush as they do him. Their clear inference is that our clients were party to Mr Shaw's allegedly corrupt activities.*
>
> *There is no truth in the suggestion that our clients have been party to any dishonest or corrupt practice in respect of the award of telecommunications contracts in Iraq or otherwise. Furthermore, Mr Shaw is not under investigation by the FBI. The articles' implications of dishonesty and fraud on the part of our clients are entirely false and highly damaging to our clients' reputations. Indeed, it is very difficult to think of allegations more injurious to the reputations of a well-respected businessman and his companies. The articles even go so far as to say that the alleged sharp practice may have indirectly caused the deaths in Iraq of many Americans and Iraqis.*
>
> *The articles are incorrect in the following respects [*eight deficiencies are identified in some detail*]….*
>
> *The articles taken as a whole and the tenor of suspicion and insinuation in which they are written implicate our clients in highly unlawful and dishonest conduct which has, it is claimed, resulted in lives being lost in Iraq. This is highly damaging to our clients' reputations. Indeed, the articles have already resulted in Guardian Net losing a telecommunications contract in Iraq; our client was informed that the CPA [i.e. the Coalition Provisional Authority, the transitional government of Iraq established following the invasion of that country in 2003] told senior executives from a large US corporation that the 'well had been poisoned' by the articles".*

29. The letter then goes on to demand, *inter alia*, an apology, a retraction and a reimbursement of legal costs. It is clearly not a letter that was lightly sent, and it concerns an episode that had manifestly aggrieved Mr Ganley and certain of his associates very considerably, causing them (the letter alleges) reputational and financial damage. So it is unlikely to be an episode that would be forgotten quickly, if at all. Ms Whelan continues as follows, at para. 29 of her affidavit of 29th January, 2016:

> *"The letter speaks for itself. It is inconceivable that Mr Ganley can have been unaware, if he was in any way serious, in swearing any of his Affidavits of Discovery, that he had threatened such proceedings. It is difficult to imagine that he would still not be able to recover the letter if he has not always had it. If he could not, it is hard to imagine why he did not include this letter at Schedule II to his Discovery. It makes reference to Los Angeles Times articles which themselves should have been discovered. [In fairness to Mr Ganley, to the extent that there is a suggestion at this point of Ms Whelan's affidavit that discovery was made of neither article, she is wrong; discovery was made of the article of 29th April 2004, thus pointing to some appreciation on his part of the relevance of such documentation to the within proceedings]. They were clearly within his power or possession. No response to the letter has been discovered, nor anything else relating to it, either before or after. Furthermore, it is difficult to see how Mr Ganley would have pursued the matter with his Solicitors without giving him what must at*

that time have been the extremely extensive documentation in his possession in relation to the whole Iraqi issue. The threatened action concerned public contracts with which Mr Ganley was intimately connected involving two companies in which I believe he may well have had a controlling interest. It is hard to see how the Addleshaw Goddard letter would not have been written without their being supplied by Mr Ganley with relevant documentation to assist them in measuring its terms. It is difficult to see how, in the context of threatened litigation, relevant documents would not have been produced in non-electronic form if they did not already exist in non-electronic form. If, as was indicated in his Second Affidavit of Discovery, such documents as disappeared did so in 2008, they should have been available in the context of the threatened proceedings by Addleshaw Goddard. If they suddenly disappeared in August 2004 within a month or so of the letter being written in July, it is hard to see how this would not have been a memorable event. If it was, it is hard to see how [Mr Ganley]…could not at the time of swearing his First Affidavit of Discovery, have remembered what is meant to have happened and the nature of the documents which he had in relation to the termination of the Second Application in relation to Iraqi telecommunications. In any event, it would appear that Mr Ganley is not discovering a document or documents of which he must be aware."

30. It is hard to disagree with Ms Whelan's various assertions; and the inexorable conclusion arises that it seems more likely than not that Mr Ganley has not thus far made discovery of all the documentation of which he ought by now to have made discovery.

III. Summary Chronology of Events

31. There is a lot by way of background facts to the applications now before the court. This being so, it is helpful to set out a summary of key events. These are as recited below.

27.11.2008 Impugned edition of *Prime Time* aired on RTÉ television.

15.12.2011 Plenary summons issues.

04.07.2012 RTÉ issues notice for particulars.

Mr Ganley's solicitors issue motion for judgment in default of defence.

31.10.2012 RTÉ ordered to deliver Defence within four weeks.

15.11.2012 RTÉ delivers Defence.

08.01.2013 Mr Ganley's solicitors request voluntary discovery of RTÉ.

Mr Ganley's solicitors issue notice for particulars.

23.04.2013 Mr Ganley's solicitors reply to RTÉ's Defence.

Mr Ganley's solicitors reply to notice for particulars of July 2012.

23.05.2013 RTE issues replies to Mr Ganley's notice for particulars.

03.10.2013 Mr Ganley's solicitors request voluntary discovery of additional documents of RTÉ.

04.08.2014 Mr Ganley's solicitors request voluntary discovery of additional documents of RTÉ and re-states other categories of discovery sought.

27.08.2014 Mr Ganley swears first affidavit of discovery.

05.12.2014 Motion for discovery issued by Mr Ganley.

08.12.2014 RTÉ writes to complain of numerous deficiencies in first affidavit of discovery.

04.02.2015 Kearns P. makes order on consent directing discovery by RTÉ within eight weeks.

06.02.2015 Mr Ganley's solicitors write seeking discovery sooner than the expiry of the eight week timeline, if possible.

09.02.2015 RTÉ writes to indicate that due to the volume of discovery, the process of making discovery is being out-sourced and they would revert once it was completed.

02.04.2015 Mr Ganley's solicitors write to RTÉ reminding it of eight-week timeline and offering another 14 days before it will seek an order striking out the Defence.

02.04.2015 RTÉ writes to indicate that it is finalising its affidavit of discovery and will seek to furnish same within next 14 days.

10.04.2015 Mr Ganley swears second affidavit of discovery.

17.04.2015 RTÉ calls Mr Ganley's solicitors by telephone to indicate that the discovery process is complete and the discovery documentation will be furnished the following week.

21.04.2015 RTÉ writes letter noting second affidavit of discovery, indicating it will review same.

28.04.2015 Mr Ganley's solicitors reply to letter of 21st April and complain at what they perceive to be a delaying tactic.

29.04.2015 RTÉ writes to complain of numerous deficiencies in first affidavit of discovery.

30.04.2015 Notice of motion issues from Mr Ganley's solicitors regarding Mr Ganley's Strike-Out Application #1.

01.05.2015 Mr Ganley's solicitors write to indicate their client has complied

05.05.2015 fully with his discovery obligations.

07.05.2015 Notice of Motion issues from RTÉ regarding RTÉ's discovery and cross-examination application.

24.07.2015 Mr Ganley swears a supplementary affidavit of discovery, his third affidavit of discovery.

01.12.2015 RTÉ sets out its position and indicates that it will not make

29.01.2016 discovery directly to Mr Ganley's solicitors pending a decision by the court as to its application to cross-examine Mr Ganley.

18.03.2016 Notice of motion issues from Mr Ganley's solicitors regarding Mr Ganley's strike-out Application #2.

--.12.2016 Motions come on for hearing. No discovery has been made to Mr Ganley's solicitors by RTÉ to this time despite the order of discovery of 4th February, 2015.

IV. Applications Now Before the Court

32. Pursuant to the foregoing, three motions have now come before the court.

33. By notice of motion of 30th April, 2015, Mr Ganley seeks an order striking out RTÉ's defence for failure to comply with the High Court Order for discovery made on 4th February, 2015 ('Mr Ganley's Strike-Out Application #1').

34. By notice of motion of 7th May, 2015, RTÉ seeks a variety of orders, including:

> (i) an order permitting RTÉ to file in court the Affidavit of Discovery sworn by Ms Katie Hannon for RTÉ, with the schedules to the said affidavit to be sealed until further directions or orders are made by the court as to the release of the schedules to Mr Ganley or otherwise;
>
> (ii) an order for further and better discovery (coupled with an order directing Mr Ganley to identify such relevant and necessary documents as were in his possession and power along with an explanation as to when he parted with them and what has happened to them);
>
> (iii) an order granting RTÉ leave to cross-examine Mr Ganley in respect of all issues arising from the Affidavits of Discovery sworn on 10th April, 2015, and 27th August, 2014; and
>
> (iv) an order dismissing Mr Ganley's claim for want of prosecution and/or failure to make proper discovery. ('RTE's Discovery and Cross-Examination Application')

35. By notice of motion of 18th March, 2016, Mr Ganley seeks an order pursuant to O.19, r.27 of the Rules of the Superior Courts, as amended, striking out paras. 8–10 of RTÉ's Defence delivered on 15th November, 2012 ('Mr Ganley's Strike-Out Application #2').

V. Applicable Legal Principles (Discovery)

(i) Required Form of Affidavit of Discovery.

36. Order 31 of the Rules of the Superior Courts 1986, as amended, is concerned with "*Interrogatories, Discovery and Inspection*". In the within proceedings the court is faced with both voluntary and court-ordered discovery. However, so far as any issues arise to the form of the discovery made, there is no distinction to be drawn between the two. This is because O.31, r.12(7) provides, inter alia, that "*Any…discovery sought and agreed between parties…shall, subject to sub-rule (9) [which is concerned with the issue of timing], be made in like manner and form and have such effect as if directed by order of the court*." O.31, r.13 provides that "*The affidavit* [of discovery]…*shall specify which, if any, of the documents therein mentioned he objects to produce, and it shall be in the Form No.10 in Appendix C.*" Form 10 identifies the following required form of affidavit:

> *"AFFIDAVIT AS TO DOCUMENTS*
>
> *[Title of action]*
>
> *I ..... make oath and say as follows:—*
>
> *1. I have in my possession, power or procurement the documents [and electronically stored information]* relating to the matters in question in this suit and falling within the relevant categories of documents specified*
>
> **in the letter requesting voluntary discovery dated ..... 20..*
>
> **in the order of the Master of this Honourable Court made on ..... 20..*
>
> *set forth in the first and second parts of the first schedule hereto.*
>
> [Court Note: When completed, this first part, Part I, should list all documents and information (i) that relate to the matters in question in the suit and (ii) which are in the possession, power or procurement of the deponent, and (iii) in respect of which there is no objection to inspection.]
>
> 2. *I object to produce the said documents* [and electronically stored information]* *set forth in the second part of the said first schedule hereto*.
>
> [Court Note: When completed, this second part, Part II, should list all documents and information in respect of

which the deponent objects to inspection.]

3. *That* [here state upon what grounds the objection is made, and verify the facts as far as maybe].

4. *I have had, but have not now, in my possession, power or procurement the documents* [and electronically stored information]* *relating to the matters in question in this suit set forth in the second schedule hereto*.

[Court Note: When completed, this Second Schedule should list all documents and information relating to the matters in question in the suit that the deponent no longer has in his possession, power or procurement. As can be seen from paras. 5 and 6 (below) the deponent should identify (i) when the documents were last in his possession, power or procurement and (ii) what has become of the said documents or information and in whose possession they now are.]

5. *The last mentioned documents* [and electronically stored information]* *were last in my possession, power or procurement on* [state when].

6. *That* [here state what has become of the last-mentioned documents or information, and in whose possession they now are].

7. According to the best of my knowledge, information, and belief, I have not now, and never had in my possession, power or procurement or in the possession, custody or power of my solicitors or agents, solicitor or agent, or in the possession, custody or power of any other persons, or person on my behalf, any document of any kind or any electronically stored information, or any copy of or extract from any such document or information, relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters, or any of them, and falling within the relevant categories of documents specified

**in the letter requesting voluntary discovery dated ..... 20..*

**in the order of the Master of this Honourable Court made on ..... 20..*

other than and except the documents [and information] set forth in the said first and second schedules hereto.*

8. I understand that the obligation on a party giving discovery is to discover all documents and electronically stored information within his/her/its possession, power or procurement within the categories agreed or ordered to be delivered that contain information which may enable the party receiving the discovery to advance its own case or to damage the case of the party giving discovery or which may fairly lead to a train of inquiry which may have either of those consequences.

Sworn, &c.

Note—

(i) Documents of the same or a similar nature, when numerous, must so far as possible, be grouped together and numbered or otherwise sufficiently marked so as to be identifiable.

(ii) Parties providing discovery shall list documents or categories of information, and shall provide documents and information for inspection, in a manner corresponding with the categories in the agreement or order for discovery, or in a sequence corresponding with the manner in which the documents or information have been stored or kept in the usual course of business by the party making discovery.

* Insert where appropriate."

37. Before proceeding to consider some relevant case-law, the court would note the obvious, which is that the rules regarding the content of an affidavit of discovery are not something to be honoured in the breach or brushed to one side; the rules are required to be observed and ought to be observed in whatever form they subsist from time to time. Sometimes the procedural and technical requirements of the superior court rules may seem an inconvenience, even an annoyance. But while those requirements can ever be improved, they cannot be ignored, least of all by the courts. For if the courts do not insist on a reasonably high level of procedural compliance, the level of such compliance will inevitably diminish, resulting ultimately in a reduction of the quality of justice emanating from our legal system. Taking cases to court is not an easy task; a multitude of obligations and pressures arise when bringing motions and making applications; ethical obligations must be complied with and court materials must comply with the rules; clients want their cases heard and relief granted while at the same time minimising legal costs. The use of affidavits offers a means of reconciling, at least to some extent, these manifold objectives and pressures. But the courts cannot be tolerant of efforts that would see the rules of affidavit evidence diluted. They cannot allow non-compliance to such an extent as would render the evidence that is being provided meaningless. Confronted with such non-compliance the courts must seek to remedy such defects and/or to take appropriate punitive measures. In the within case the court does not see the need, at this time, for punitive measures; however, there is the clearest of needs presenting to remedy such defects in the discovery at hand in order that, regardless of eventual outcome, both parties to the within proceedings enjoy that most basic of rights, being a fair trial of the dispute now arising between them.

(ii) Some general obligations on party making discovery.

38. In the course of his judgment in *Thema International Fund plc v. HSBC Institutional Trust Services* (Ireland) Ltd. [2012] 3 IR 528, a case involving various applications concerning discovery, Clarke J. observed, at para. 21, that "*[T]he basic obligation on any party is to comply, to the best of its ability, with any order for discovery made*", adding that "*a number of ancillary obligations also arise*", these being, per Clarke J., at paras. [22]–[24]:

"[22] First, where it is likely that the scale of discovery which will be required to be made is significant and, thus, likely to be lengthy and costly, there is, it seems to me, an obligation on a party to consider how best it can meet any likely obligation to make discovery in a way which does not unduly delay the trial of the proceedings and which does not add unnecessarily to the costs likely to be incurred. While it is true that the specific and formal legal obligations of parties are those which are defined in court orders (or agreements between parties concerning discovery which have the same status as a court order) nonetheless, it seems to me that parties have general

> *obligations which go beyond formal compliance with the orders of the court. In the context of the questions which arise in these proceedings it is, therefore, important to note some aspects of those obligations.*
>
> *[23] Since the decision of the Supreme Court in* Framus Ltd. v. CRH plc*…[2004] 2 I.R. 20, it has been clear that the court must pay attention to the principle of proportionality in deciding on the breadth of discovery to be ordered. It is also clear from* Telefonica O2 Ireland Ltd. v. Commission for Communications Regulation *[2011] IEHC 265…(and the cases cited therein) that proportionality can also play a role in relation to the disclosure of confidential information, at least in circumstances where documents are sought to be disclosed which are highly confidential (and, in particular, where the confidence of third parties is involved) and where the relevance of the documents concerned to the case may be at best marginal. It remains, of course, the case that, as Kelly J. pointed out in* Cooper Flynn v. Radio Telefís Éireann *[2000] 3 I.R. 344, the requirement that justice be administered fairly will trump any obligation of confidence in ordinary circumstances so that confidentiality will not, ordinarily, provide a basis for the non-disclosure of materials which are of real relevance to the proceedings.*
>
> *[24] It also seems to me that proportionality is a relevant consideration when the court has to determine the way in which a party is to comply with its discovery obligations. There is, potentially, an interaction between the speed at which a discovery obligation has to be met, on the one hand, and the costs of complying with discovery obligations, on the other hand. While there may be some absolute limits to the speed at which aspects of the identification and analysis of materials which might potentially be included in a discovery affidavit can be achieved, nonetheless it is likely that the application of additional resources (whether they be human or technological) can speed up the process although sometimes at a not inconsiderable cost. In the ordinary way, it seems to me that a court, in considering the length of time which a party should be given to comply with a discovery obligation, should have regard to what might be considered an acceptable length of time having regard for the need for the case to come to trial with reasonable expedition, but also to the costs that might have to be incurred by greater expedition and to then strike an appropriate or proportionate balance."*

39. Reducing the above text to its essence, Clarke J. identifies five principles:

> (1) where it is likely that the scale of discovery to be required is significant there is an obligation on a party to consider how best it can meet any likely obligation to make discovery in a way which (a) does not unduly delay the trial of the proceedings and (b) does not add unnecessarily to the costs likely to be incurred;
>
> (2) a court must pay attention to the principle of proportionality in deciding on the breadth of discovery to be ordered (*Framus*);
>
> (3) proportionality can also play a role in relation to the disclosure of confidential information where the relevance of the documents concerned to the case may be at best marginal (*Telefonica*);
>
> (4) the requirement that justice be administered fairly will trump any obligation of confidence in ordinary circumstances (*Cooper Flynn*); and
>
> (5) proportionality is a relevant consideration when the court has to determine the way in which a party is to comply with its discovery obligations.

(iii) Obligation of solicitor in discovery process.

40. The court has been referred to the judgments in *Irish Nationwide Building Society v. Charlton* (Unreported, Supreme Court, 5th March, 1997) in which Murphy J. notes that a solicitor is under a "*duty to take positive steps to ensure that his client appreciates the extent of the obligation imposed by an order for discovery*", and *Balla Lease Developments Ltd. v. Keeling* [2006] IEHC 415, in which Kelly J. observes that "it is to solicitors that the obligation primarily falls to ensure that discovery is made in accordance with both the letter and spirit of the agreement for such discovery or the court order which directs it". The court does not propose to consider these judgments in any detail as there is no evidence before the court, none at all, that points to any failing on the part of any of the solicitors, or indeed any other professional advisors, to either of the parties to these proceedings, as regards the process of discovery.

(iv) Want of discovery.

41. In *Sterling-Winthrop Group Ltd v. Farbenfabriken Bayer Aktiengesellschaft* [1967] IR 97 the plaintiffs claimed that the defendants intended to use certain of the plaintiffs' intellectual property rights and to pass off the defendants' goods as those of the plaintiffs. Affidavits of discovery were filed by the defendants and the plaintiffs made application for further and better discovery. The court has been referred to Kenny J.'s overall summary of principle, at 100, but his review of case-law in the following pages which led him to that overall summary of principle is also of interest. First, the overall statement of principle, at 100:

> *"Although the rules of court have never provided for an application by either party for an order that the other party should make a further affidavit of discovery…the Courts in Ireland and England have always had power to order that either party should make a further affidavit. Such an order will not be made when the application is based solely on an affidavit alleging that the other party has documents in his possession relevant to the action which have not been disclosed by the first affidavit. The Court will, however, order a further affidavit of documents when it is satisfied (a) from the pleadings, (b) from the affidavit of discovery already filed, (c) from the documents referred to in the affidavit of discovery, or (d) from an admission by the party who has made the affidavit of discovery that the party against whom the order is sought has other documents in his possession relating to the issues in the action which have not been disclosed by the first affidavit. The Court will also order a further affidavit when there are grounds, derived from the documents discovered, for suspecting that there are other relevant documents in the possession of the party who has made the affidavit or where there are reasonable grounds for believing that the person making the affidavit of discovery has misunderstood the issues in the case and has, in consequence, omitted documents from it."*

42. This conclusion as to applicable principle followed from, albeit that in the actual text of the judgment it preceded, a review by Kenny J., at pp. 100–104, of eighty years of case-law, that showed a progressive extension of the grounds on which the court will order a further affidavit:

"In Jones v. Monte Video Gas Co*. [(1880) 5 QBD 556], a decision of the English Court of Appeal, Lord Justice Brett said at p.558:-…[W]e are of opinion that the rule to be observed is as follows: either party to an action has a right to take out a summons that the opposite party shall make an affidavit of documents: when the affidavit has been sworn, if from the affidavit itself, or from the documents therein referred to, or from an admission in the pleadings of the party from whom discovery is sought, the master or judge is of the opinion that the affidavit is insufficient, he ought to make an order for a further affidavit; but except in cases of this description no right to a further affidavit exists in favour of the party seeking introduction. It cannot be shewn by a contentious affidavit that the affidavit of documents is insufficient….In that case the defendants admitted that they had in their possession the documents of which discovery was sought but contended that they were not relevant and the Court of Appeal refused to order that a further affidavit should be filed.*

In Ross v. Dublin Tramways Company *[8 LR Ir. 213]…a decision of the Exchequer Division (Palles CB and Fitzgerald B) the court adopted the role laid down in Jones…but decided that the documents discovered by the defendants showed that they had other documents in their possession, relevant to the issues in the action, and ordered a further affidavit.*

*The judgment of Lord Justice Brett in [*Peruvian Guano *identifies the 'may, not must' test of relevance, then continues]…[T]he question upon a summons for a further affidavit is whether the party issuing it can shew, from one of the sources mentioned in Jones…that the party swearing the first affidavit has not set out all the documents falling within the definition which I have mentioned and being in his possession or control. I agree that the party issuing the summons for a further affidavit is bound by the description given in the sources of information mentioned in Jones…that is to say, he is bound to a certain extent: I do not think that he would be bound absolutely by every description of their contents if the Court can see, from the nature of them, that the description of them is not or may not reasonably be correct. I do not think that the Court is bound any more on the second summons than on the first to accept absolutely everything which the party swearing the affidavit says about the documents, but the Court is bound to take his description of their nature. The question must be, whether from the description either in the first affidavit itself or in the list of documents referred to in the first affidavit or in the pleadings of the action, there are still documents in the possession of the party making the first affidavit which, it is not unreasonable to suppose, do contain information which may, either directly or indirectly, enable the party requiring the further affidavit either to advance his own case or to damage the case of his adversary, in order to determine whether certain documents are within that description, it is necessary to consider what are the questions in the action: the Court must look, not only at the statement of claim and the plaintiffs' case, but also at the statement of defence and the defendants' case'. In that case the Court of Appeal ordered that a further affidavit of documents should be made.*

In Lyell v. Kennedy *[(No. 3) (1884) 27 Ch.D. 1] Lord Justice Cotton [in the Court of Appeal] said, at p.20, that the Court might order a further affidavit of discovery if it saw anything to raise a reasonable suspicion that the party who had already made an affidavit had other documents relating to the matters in question in his possession. In* Components Tube Co. v. Naylor *[32 ILTR 37]…the Queen's Bench Division in Ireland approved the decisions in Jones…and…Lyell…and ordered the plaintiffs to make another affidavit of discovery because they were satisfied that there were other documents in the possession of the secretary of the plaintiff company which were relevant. In* Lysaght v. Mullen *[32 ILTR 65] Porter MR refused to order a further affidavit of documents because the affidavit already filed was regular and there was what he called 'mere suspicion' that there were other documents in the possession of the person who had made the affidavit. In* Dunne *v.* Johnson *[2 NIJR 23] the King's Bench Division in Ireland refused an application for a further affidavit of documents when the only proof that such documents existed was a contentious affidavit by the plaintiff.*

British Association of Glass Bottle Manufacturers Ltd v. Nettlefold *[[1912] AC 709, a decision of the House of Lords] is authority for the view that the Court may order a further affidavit when it is satisfied that the party may order a further affidavit when it is satisfied that the party making the first affidavit has not properly understood the issues involved in the action….These principles were applied by the Supreme Court in…* Kreglinger and Fernau v. The Irish National Insurance Company *[a decision of the Supreme Court from 1954 which is belatedly reported at [2000] 2 I.L.R.M. 386] in which that Court reversed a decision of the High Court which ordered a further affidavit of discovery."*

43. Moving on, in *Bula Limited v. Crowley* [1991] 1 IR 220, an appeal concerning various motions for discovery, Finlay CJ observes, at 223, that "*A submission was made on behalf of the defendant Laurence Crowley that these documents had in substance been discovered by McKay and Schnellmann Ltd. against whom the proceedings were not commenced until 1988. This does not, as a matter of principle, in my view, absolve the defendant Laurence Crowley from discovering the documents if they are relevant, and the plaintiffs are entitled to discovery from both the defendants concerned. I would, therefore, order the further discovery of these documents*." In other words, the fact that documents have been discovered by one party to an action does not relieve the other party of the obligation to make discovery.

44. In the within proceedings, having regard to the facts before it at this time, it seems to the court that there is likely documentation of which discovery has not been made by Mr Ganley and of which discovery ought to have been made. For example, the wholesale omissions in the Albanian documentation, the absence of any documentation relating to the proposed establishment of Ganley International Bank in Latvia, the general absence of any documentation concerning the acquisition of a 50 per cent share in an Albanian gas field, the absence of any documentation concerning Mr Ganley's purported role as an advisor on technology and terrorism to the *Club de Madrid* group of heads of state and government, and the almost complete absence of documentation relating or referring to Mr Ganley's interest in the contract for a telecommunications network in Iraq back in 2004. To take but one of these examples, it just does not ring true that a tender for a major telecommunications contract would yield discovery of but a single e-mail. This being so, the case being so clearly established for an order for further and better discovery, it seems to the court that the critical question for determination by it is not so much whether there should be an order for further and better discovery but whether the facts establish this to be one of those exceptional cases in which the court should go beyond 'merely' ordering further and better discovery and order that Mr Ganley be cross-examined on his affidavits of discovery.

(v) Strike-out for want of discovery.

45. Under O.31, r.21 of the Rules of the Superior Courts (1986), as amended, "*If any party fails to comply with any order…for discovery* [and the court notes again the significance of O.31, r.12(7) in this regard*]…[h]e shall also, if a plaintiff be liable to have his action dismissed for want of prosecution and, if a defendant, to have his defence, if any, struck out, and to be placed in the same*

position as if he had not defended…".

46. Both parties have made application for strike-out for want of discovery in the within proceedings, both have urged upon the court that this is very much an order of last resort, and neither party, it seemed to the court anticipated that such an order would be made, and rightly so. The court is mindful in this regard of the helpful recent decision of Noonan J. in *Leahy v. OSB Group Limited and ors* [2015] IEHC 10 where he undertakes the following analysis of applicable authority:

> *"In…* Campion v. Wat *[2013] IEHC 45, the court was dealing with a[n]…application to…strike out the plaintiff's claim for failing to make discovery as ordered….[T]he defendant alleged…that an analysis of the documents actually discovered by the plaintiff strongly suggested that the plaintiff must have further documents he had not discovered. Ryan J. said (at para. 14):*
>
> *"14. But once discovery has actually been made, it is not generally the function of this Court to make determinations of fact in order to decide whether the claim should be struck out. It would not be possible on the basis of the affidavits alone for this Court to do that. It would obviously be necessary to have a hearing at which the plaintiff was cross-examined. This is in accordance with the jurisprudence in respect of discovery of the Supreme Court as decided in* Murphy v. J Donohue Limited *[1996] 1 I.R. 123 and the cases therein cited. The headnote states at para. 2 as follows:-*
>
> > 'That O. 31, r. 21 of the Rules of the Superior Courts, 1986, existed to ensure compliance with orders for discovery rather than to punish those who default; and that while cases might exist where a defence should be struck out because one party might not be able to get a fair trial as a result of the other parties wilful refusal to comply with an order for discovery, such cases would be extreme.'
>
> *"Since the plaintiff has now made discovery in appropriate form, I do not think that it is for me to determine on the basis of probability or improbably whether his explanations are correct or not. Neither am I able to contrast the pleadings to date with the contents of the discovery affidavit or affidavits in order to determine the truth. In the circumstances, it is not appropriate for me to make an order dismissing the plaintiff's case and it would not be just to do so."*
>
> *25. In a further passage…Ryan J. said (at para. 17):*
>
> > "17.…Nothing in my decision will inhibit the exploration by the defendant's counsel of any of the matters that he raises by way of comment or criticism of the conduct of the plaintiff including, in particular, the manner in which he has dealt with the order of Cross J. in respect of discovery of documents. Indeed, it is in my view most convenient just and appropriate that the consideration of the veracity of assertions made by the plaintiff should be carried out in the course of the trial of the issues in accordance with the pleadings."
>
> *26. In Green Pastures (Donegal) v. Aurivo Co-Operative Society Ltd & Anor [2014] IEHC 209, the plaintiff applied for an order striking out the first defendant's defence for failing to make discovery or alternatively for further and better discovery. Ryan J. reviewed the law and the submissions of both parties and said (at p.8):*
>
> > "In *Mercantile Credit Company of Ireland & Anor v. Heelan & Ors* [1998] 1 I.R. 81, in considering an application to strike out a defence for failure to make discovery as per O. 31, r. 21 RSC, Hamilton C.J. held at p. 85:-
> >
> > 'The power given by the said rule to the court to strike out the defence of a defendant who has failed to comply with an order for discovery is discretionary and not obligatory, and should not be exercised unless the court is satisfied that the defendant is endeavouring to avoid giving the discovery, and not where the omission or neglect to comply with the order is not a culpable one, for instance, if it is due to loss of memory or illness.
> >
> > It should only be made where there is wilful default or negligence on the part of the defendant and then only upon application to the court for an order to that effect.
> >
> > The powers of the court to secure compliance with the rules and orders of the court relating to discovery should not be exercised so as to punish a party for failure to comply with an order for discovery within the time limited by the order.'
>
> *27. The Plaintiff also cites* Johnston v. Church of Scientology *(Unreported, Supreme Court, 7th November, 2001) where the Supreme Court reiterated that the courts have jurisdiction to strike out a claim or a defence when they are satisfied that the extent of non-compliance with the order is such that it is not possible to have a fair trial. The Plaintiffs submit that Johnston supports their contention that the Defendant's non-compliance with discovery obligations will prevent them from having a fair trial. As Keane CJ held (at p.11):*
>
> *"[…] The court has a jurisdiction and there is no issue about this, to strike out proceedings or to strike out a defence filed by a defendant where it is satisfied that the extent of the non-compliance with the court's order is such that it is not possible to have a fair trial as a result and of course that may also arise where it appears from the affidavit that some particular documents or some category of documents have been in fact destroyed by the party concerned, whether innocently or whether deliberately in order to interfere with the further conduct of the case."*
>
> *28. Keane CJ then cited the decision of Barrington J. in Murphy v. J Donoghue Ltd [1996] 1 I.R. 123, where he said (at p. 142):*
>
> *'[U]ndoubtedly cases may exist where one party may not be able to get a fair trial because of the other party's wilful refusal to comply with an order for discovery. In such cases it may be necessary to dismiss the plaintiff's claim or to strike out the defendants' defence and such cases will be extreme cases.'*
>
> *29. Dealing then with the defendant's submissions, Ryan J. said in Green Pastures (at p.10):*
>
> *"On the application to have the defence struck out, the first defendant submits that if any default on their part had been identified, striking out the defence would not be appropriate in light of* Campion v. Wat *[2013] IEHC 45. A*

more appropriate method to query assertions made by the plaintiff on affidavit would be by way of cross-examination. While O. 31, r. 21 RSC gives the court authority to strike out a defence if a party fails to comply with an order for discovery, the jurisdiction is exercised in the most extreme cases. This point was affirmed by the Supreme Court in Murphy v. J. Donohue Limited *[1996] 1 I.R. 123 where Barrington J. held at p. 142:-*

"Order 31, r. 21, exists to ensure that parties to litigation comply with orders for discovery. It does not exist to punish a defaulter but to facilitate the administration of justice by ensuring compliance with the orders of the court."

This approach is outlined more recently in Dunnes Stores v. Irish Life Assurance *[2010] 4 I.R. 1, where Clarke J. held at p 8:-*

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

47. Summarising his reading of the above authority, Noonan J. observes as follows, at paras. 30-31 of his judgment:

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

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

48. *Stricto sensu*, having regard solely to this last-quoted text, the court would be within its rights to order a strike-out of Mr Ganley's proceedings for failure to make proper discovery. Having regard to the facts pertaining to date in the within proceedings, as identified by the court previously above, there is an ongoing failure by Mr Ganley to comply with the agreement as to discovery, it appears to the court that such failure cannot but be deliberate, e.g. the provision of a single e-mail concerning an entire tendering exercise, and certainly if matters go uncorrected it seems to the court that the inexorable result would be to deprive RTÉ of a fair trial. However, it is clear that the courts generally recoil from taking so drastic a step as to grant an order for strike-out where some other avenue remains open to ensuring that there is proper discovery, and in the within proceedings the court considers that such an avenue exists. The court is buttressed in this last conclusion by its consideration of authority under the heading "*Deprivation of fair trial*" below.

(vi) Deprivation of fair trial.

49. In *Hansfield Developments Ltd and ors v. Irish Asphalt Ltd and ors* [2010] IEHC 32, which featured yet another application, inter alia, to strike out for want of discovery, this time in circumstances where Gilligan J. found, at section 8 of his judgment that "*the discovery made by the plaintiffs in June 2008…was inadequately handled by or on behalf of the plaintiffs*" but went on to find that there was not "*a wilful attempt to suppress documentation that ought to have been discovered, nor was there any attempt on the part of the plaintiffs to deliberately interfere with the conduct of the case*", concluding "*I do not consider that the failures which occurred were deliberate or dishonest*." Having regard to applicable authority, Gilligan J. emphasised the need, in a strike-out application, to consider whether a fair trial could be achieved notwithstanding the failure to make discovery, observing as follows, again in section 8 of his judgment:

"As enunciated by Clarke J. in Dunnes Stores (Ilac Centre) Ltd. v. Irish Life Assurance Plc & Anor *(Unreported, High Court, Clarke J., 23rd April 2008) discovery relies to a large degree on trust. The purpose of the agreement that was reached between the parties hereto was to define the obligations of the parties concerning disclosure of documents, and it was then incumbent on those persons charged with swearing the affidavit of discovery upon whom a trust is placed that they will conscientiously and diligently deal with the task in hand. As Clarke J. pointed out, mistakes can and do happen and they can range from the entirely innocent and understandable to those which might be characterised as blameworthy to a greater or lesser degree. At the other extreme are cases where there has been a deliberate failure to disclose material information. If a party does not fully understand any aspect of the obligation imposed in respect of discovery, for example, with an issue such as privilege, the obligation is to take proper legal advice and to act upon it….*

The defendants have strongly urged upon the court that the plaintiffs have not and, effectively, will not make discovery. I am not so satisfied. I note the apology tendered to the Court in respect of the June 2008 discovery and the acceptance on the plaintiffs' behalf of the necessity to engage with the defendants and to comply with their discovery obligations. I note the retention of a dedicated panel of Junior Counsel and the additional retention of Price Waterhouse Coopers, chartered accountants, to assist with the e-discovery. I note the assurance given on the plaintiffs' behalf that they will abide by any direction of the court as regards ongoing discovery. I take the view that the directions which have been given in respect of the several issues that arise will bring about a situation whereby if complied with, the plaintiffs will have made full discovery….

It is clear from the authorities that an order to dismiss a claim or to strike out a defence pursuant to O. 31 r. 21 should not be granted lightly. Such an order does not follow inevitably from a failure to make sufficient discovery. In Mercantile Credit Company of Ireland Ltd. v. Heelan [1998] 1 I.R. 81 at p. 85 Hamilton C.J. (O'Flaherty and Denham JJ concurring) stated, having quoted O. 31 r. 21:-

> "The power given by the said rule to the court to strike out the defence of a defendant who has failed to comply with an order for discovery is discretionary and not obligatory, and should not be exercised unless the court is satisfied that the defendant is endeavouring to avoid giving the discovery, and not

where the omission or neglect to comply with the order is not a culpable one, for instance, if it is due to loss of memory or illness.

It should only be made where there is wilful default or negligence on the part of the defendant and then only upon application to the court for an order to that effect.

The powers of the court to secure compliance with the rules and orders of the court relating to discovery should not be exercised so as to punish a party for failure to comply with an order for discovery within the time limited by the order."

Similarly in Murphy v. J. Donohoe Ltd*. [1996] 1 I.R. 123 at p. 142 Barrington J., with whose judgment Hamilton C.J. and O'Flaherty J. agreed, stated:*

"Order 31, r. 21, exists to ensure that parties to litigation comply with orders for discovery. It does not exist to punish a defaulter but to facilitate the administration of justice by ensuring compliance with the orders of the court.

Undoubtedly cases may exist where one party may not be able to get a fair trial because of the other party's wilful refusal to comply with an order for discovery. In such cases it may be necessary to dismiss the plaintiff's claim or to strike out the defendant's defence. But such cases will be extreme cases."

Barrington J. then referred to Hamilton C.J.'s conclusion in Mercantile Credit that the relevant powers should not be exercised to punish a party for failure to comply with a discovery order within the time limited by the order.

In Johnston v. Church of Scientology (Unreported, Supreme Court, 7th November 2001) Keane CJ in an ex tempore judgment stated:

'…when the trial judge came to deal with the notice of motion requiring that the plaintiff's claim should be struck out because of failure to comply with this order for discovery he quite rightly in my view approached the case on the basis that it was an extraordinarily wide ranging order for discovery and in applying the principles that he did and correctly, in my opinion, he quite rightly took into account the nature of the order of discovery made. The court has a jurisdiction and there is no issue about this, to strike out proceedings or to strike out a defence filed by a defendant where it is satisfied that the extent of the non-compliance with the court's order is such that it is not possible to have a fair trial as a result and of course that may also arise where it appears from the affidavit that some particular documents or some category of documents have been in fact destroyed by the party concerned, whether innocently or whether deliberately in order to interfere with the further conduct of the case. There is no doubt that the courts enjoy such a jurisdiction but the law is stated as follows by Mr. Justice Barrington speaking for this court in the case of Murphy…

'undoubtedly cases may exist where one party may not be able to get a fair trial because of the other party's wilful refusal to comply with an order for discovery. In such cases it may be necessary to dismiss the plaintiff's claim or to strike out the defendants' defence and such cases will be extreme cases'.

As Chief Justice Hamilton put it in Mercantile Credit…, the powers of the courts to secure compliance with the Rules and Orders of the court relating to discovery should not be exercised so as to punish a party for failure to comply with an order for discovery within the time limited by the order.'

Keane C.J. went on to apply those principles, noting that it was not disputed on behalf of the defendants that they were the principles to be applied. Like the judgment of Barrington J. in Murphy, the judgment of Keane C.J. in Johnston does not appear to contemplate any distinction between a motion to strike out a plaintiff's claim and a motion to strike out a defendant's defence in terms of the principles applicable to each… A question arises as to whether a wilful refusal to make discovery is required or whether a negligent failure to comply is sufficient. It was submitted on behalf of the plaintiffs that there would have to be a wilful refusal to make discovery in order for the Court to dismiss the plaintiffs' claim….that is not to say that a negligent failure to make discovery, without more, will suffice to warrant a dismissal or strike out. It is also necessary, as the passages quoted above from the judgments of Barrington J. in Murphy and Keane C.J. in Johnston indicate, to consider whether a fair trial can be achieved notwithstanding this failure. As Clarke J. said in Dunnes Stores at paras. 3.5 to 3.6 of his judgment:

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

3.6 It is only if it is proper and appropriate to conclude or infer from the failure to make proper discovery in the first place that the failure concerned was designed for the purposes of not giving access to the other side to relevant information and where it would be appropriate to infer, in turn, from such a finding, a particular view on the issues to which that information refers, that it would be appropriate to allow a failure to make proper discovery to influence the courts decision on the merits of the case…'."

50. Consistent variations on the *Hansfield-Dunnes Stores* theme can be found in cases such as *Wicklow County Council v. O'Reilly* [2010] IEHC 464, *Paulson Investments Limited and Albert Enterprises Limited v. Jons Civil Engineering Limited and PJ Edwards and Company Limited* [2012] IEHC 541 and, more recently, *Go2CapeVerde Limited and Blawerk IX LDA v. Paradise Beach Aldemento Turistico Algodoeiro SA* [2014] IEHC 531.

51. It seems to the court, having regard to all of the just-mentioned authorities that the following points might usefully be made in the context of the within proceedings.

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

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

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

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

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

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

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

(vii) Cross-Examination on Affidavit of Discovery.

59. In *Ryanair Limited v. Van Zwol and ors* [2016] IEHC 264, at para. 19, the High Court identified, by reference to previous case-law, the various principles applicable, *inter alia*, to cross-examination on an affidavit of discovery, which principles are replicated below and applied by the court here (the various case-references made in the below-quoted text have been excised):

> *"19. It seems to the court that the following principles of relevance can be identified, inter alia, from the above-mentioned cases…*
>
> *II*
>
> *Cross-Examination on Affidavit of Discovery*
>
> *11. The administration of justice, as vested by the Constitution in the courts, requires that the courts have the ability to adjudicate fully upon the adequacy and accuracy of an affidavit of discovery….*
>
> *12. There are circumstances in which it may be permissible to cross-examine on an affidavit of discovery….*
>
> *13. The court may exercise a judicial discretion as to whether there may be cross-examination on an affidavit, including an affidavit of discovery….*
>
> *14. Because of the variety of other remedies available with a view to testing matter contained in an affidavit of discovery (e.g. further and better discovery, interrogatories, court inspection) the circumstances in which cross-examination on an affidavit of discovery will be allowed are very rare….*
>
> *15. It is wholly undesirable that, save in the most exceptional cases, the court should be called upon to deal with questions such as the existence or non-existence of a document in circumstances where such a question might impinge to a serious extent on the issues in the action….*
>
> *16. Cross-examination on an affidavit of discovery should only be permitted where it is necessary and other remedies (e.g. further and better discovery, interrogatories, court inspection) prove inadequate….*
>
> *III*
>
> *Unitary Trial and Other Guiding Factors*
>
> *17. The unitary trial is in general the mode of disposal of a case, unless a preliminary issue of law or a modular issue will genuinely help in disposal and not cause irremediable prejudice….*
>
> *18. Departure from the basic rule of a unitary trial must be genuinely helpful in terms of saving court time, minimising costs and truly helping, not hindering the ultimate trial….*
>
> *19. Examination of a party or of a witness prior to trial, should not become the trial itself….*
>
> *20. As with interrogatories, it is difficult to conceive of any circumstances where a party would be granted leave to engage in a general cross-examination on an affidavit of discovery in advance of a trial: any such procedure is properly to be confined to trial….*
>
> *21. As with interrogatories, any order allowing cross-examination on an affidavit of discovery should not only be directed rarely but should always be specifically directed to one or more particular issues….*
>
> *22. Interrogatories and discovery and replies to particulars are methods whereby a fair appraisal of opposing claims may be made prior to trial. Their existence depends on the probability of their being of assistance, relevance to the claim as pleaded and the requirement that oppression through use of pre-trial procedures is avoided….*
>
> *23. New procedures that are not of assistance should not be allowed to spring up whereby the courts' resources are used to split up trials unnecessarily or to impose burdens that do not help litigation."*

60. The court turns now to apply the above principles to the facts before it. (The numbers are references to those numbers which appear in the above-quoted text).

Re. 11–13. Noted.

Re. 14–16. Noted. However, the court is not persuaded that those other remedies would be of any assistance in circumstances where, inter alia, the deficiencies in Mr Ganley's discovery to date are not attributable to any 'inadequate handling' of matters by any of his advisors, the court considers that the clear absence of information that must be available (examples of this information have been recited previously above) cannot but be deliberate, the failure aforesaid does not appear to the court to be attributable to any want of understanding on the part of Mr Ganley as to his obligations under the discovery process, it is obvious that there has been a complete breakdown in that (wary) trust which is a feature of the typical discovery process, and there is no acceptance on the part of Mr Ganley that the discovery process thus far has been deficient and that improvements will be forthcoming.

Re. 17–18 It seems to the court that there is no way of ensuring a fair trial,

& 22–23. and what would be perceived as a fair trial, of the principal cause of action arising between the parties without resolving the issues presenting as regards Mr Ganley's discovery to date.

Re. 19–21. These are matters to which the court returns later below but to which counsel for RTÉ should pay especial heed.

VI. Mr Ganley's Strike-Out Application #2
(i) Background.

61. By notice of motion of 18th March, 2016, Mr Ganley seeks an order pursuant to O.19, r.27 of the Rules of the Superior Courts, as amended, striking out paras. 8–10 of RTÉ's Defence delivered on 15th November, 2012. Ultimately, this application arises from the fact that, in his statement of claim in the within defamation proceedings, Mr Ganley does not identify the specific words that he claims are defamatory of him. Rather, it is pleaded in a general way, at para.3 that RTÉ "published words that were defamatory of and concerning [Mr Ganley]" and then refers to a transcript of the entire broadcast which is attached to the statement of claim. Because of this, RTÉ, by notice of particulars dated 4th July, 2012, requested Mr Ganley to identify precisely what words employed in the impugned programme bore or were understood to bear each of the defamatory meanings pleaded at para. 6 of the statement of claim. The notice for particulars dated 4th July, 2012, was responded to by replies dated 23rd April, 2013. Again, however, Mr Ganley failed to identify any specific words contained in the impugned 'Prime Time' programme which are defamatory of him, and also failed to identify or particularise any specific words alleged to bear any of the meanings pleaded at para. 6 of the statement of claim. Rather, Mr Ganley asserts, somewhat vaguely, at para. 2 of the replies, that "the programme in its totality was defamatory" and points to various segments of the programme and all the words uttered therein; it is helpful to recite these in some detail:

> *"2.* [Mr Ganley]*…repeats the programme in its totality was defamatory of [Mr Ganley]…but, inter alia, in the following regard,*
>
> *(a) the title 'Citizen Ganley' a copy of the hit movie 'Citizen Kane' invoking an image of an utterly ruthless and single-minded businessman. The studio is dimly lit and the presenter is seen wearing a black dress creating a morbid atmosphere. The RTÉ studio is not usually lit this way for other episodes of the same programme.*
>
> *(b) the use of an actor dressing in his bedroom at the opening section, creating the impression this person is* [Mr Ganley]*…when it was not, hiding the person's face, it also serves to create doubt in the mind of the viewer from the outset and an obvious recreation of the famous opening scene in the mafia movie 'The Pope of Greenwich Village' to create the impression…*[Mr Ganley] *was somehow not a legitimate business man.*
>
> *(c) deploying malignant music throughout the programme, this creates the impression that* [Mr Ganley]*…is involved in mysterious and clandestine activities. For example, much of the 'Citizen Ganley' programme backing sound track comes from 'The Bourne Ultimatum', a movie about a rogue CIA agent who murders people around Europe while on the run. The same frightening 'mood music' is also a feature in 'Assassin's Creed' a mass market video game.*
>
> *(d) sifting through and taking out positive statements about…*[Mr Ganley] *from research interviews undertaken, to skew the pieces for camera.*
>
> *(e) receiving a full telephonic interview from* [Mr] *Pers Sternins, the former Deputy Minister of State for Latvia, but arriving uninvited the following day to his office and 'gate crashing' his property then filming the entire event from a taxi with its meter running to create the clear impression that interviewees were reluctant to speak about the plaintiff…..*.[RTÉ] *says 'Prime Time is satisfied that Per Sternins offered us his honest recollection of Mr Ganley's role at the time' however the recorded interview that took place prior to…*[RTÉ] *arriving uninvited is never played to the audience.*
>
> *(f) deploying a map shot accompanied with malignant music throughout the programme to show…*[Mr Ganley's] *movements around Europe, a tactic used in the Bourne Identity movie by CIA officers attempting to track the rogue homicidal agent on the loose.*
>
> *(g) using academics to discuss the macro economic circumstances at work in Latvia at the time…*[Mr Ganley] *was working there and making references to how exporters, as* [Mr Ganley]*…was then, would be subject to mafia hits. There is a clear insinuation that* [Mr Ganley]*…would have to have ties with the mafia if doing business exporting through those ports. Insinuating he was either involved in or protected by organized crime.*
>
> *(h) disputing that* [Mr Ganley]*…was ever a paid advisor to the Latvian government when* [Mr Ganley]*…did not so claim….*[Mr Ganley] *only ever claimed to be an advisor to certain members of the Latvian government, which he was.*
>
> *(i) filming a spokesperson for the Prime Minister who states the Prime Minister does not remember* [Mr Ganley] *…being an important advisor to him, knowing very well this is not what* [Mr Ganley]*…claimed.*

(j) selecting a person who claims only to have bumped into [Mr Ganley]*…once in an hotel, in preference to a host of potential interviewees who have known* [Mr Ganley]*…for many years and were offered as willing subjects for interview; then using that person's interview to further create the impression* [Mr Ganley]*…is lying about being an advisor to the Latvian government because this individual claims he was told by* [Mr Ganley]*…that* [Mr Ganley] *…intended setting up a bank and when he decided to check whether the necessary documents had been registered with the Department of Finance, found they had not.*

(k) in a programme allegedly represented as telling the true life story of [Mr Ganley]*…failing to even mention his creation of a very successful pan-Euoprean broadband wireless telecommunications business that rolled out across ten countries in Europe and employed hundreds of people. It was acquired by one of the largest cable/media operators in the world. Not once does this positive success story get mentioned in the investigative programme.*

(l) interviewing a government minister, [Mr] *Dick Roche, who claims* [Mr Ganley]*…is a man who seems to have an extraordinary disregard for the truth.*

(m) interviewing an Irish Times journalist who states that [Mr Ganley]*…claimed to have put together a deal amalgamating six Central American television stations but that when he spoke to* [Mr Ganley's]*…partner there that partner said nothing ever came of the discussion and that it is unprecedented to make up something like this….*

(n) reference is made to [Mr Ganley's]*…bid for the second mobile phone licence in Ireland, won in controversial circumstances by* [Mr] *Denis O'Brien and the subject of the Moriarty Tribunal. A journalist is interviewed who states that no-one knew who* [Mr Ganley]*…was, creating the clear impression* [Mr Ganley]*…was not being taken seriously, however…*[RTÉ] *itself was a 15% shareholder in the consortium led by* [Mr Ganley]*….Moreover, the bid documentation was assembled in Montrose* [where RTÉ is headquartered], *where* [Mr Ganley]*…spent many happy hours working with personnel from* [RTÉ] *and with the backing of…*[RTÉ's] *board. Not one word of this was mentioned in the piece intended to show who…*[Mr Ganley] *really is.*

(o) asking if [Mr Ganley]*…is a CIA operative, then if not, a servant of the neo-conservative establishment in the United States of America. In either manner, creating the impression without any evidence that* [Mr Ganley]*…is a puppet for powerful political forces in the United States of America.*

(p) picturing a dead body with the clear implication [Mr Ganley]*…was somehow involved in…*[Mr Trebicka's] *death because, even though [RTÉ]…then expressly denied on the programme they were linking* [Mr Ganley]*…with the death, took the very unusual step of showing the shocking image of a man dead, or dying, on the street after a piece where they have just linked both men as colleagues.*

(q) ending the programme with silent credits, a television device used to mark respect when someone has died and to create doubt for the viewer regarding the credibility of [Mr Ganley]*…again linking* [Mr Ganley]*…the subject of the show, and in a very meaningful way, with the dead body shown on the programme itself."*

62. RTÉ is referred to this answer throughout the balance of the replies, with the additional below-quoted note at para. 12 of the replies:

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

63. On the day that the notice for particulars of 4th July, 2012, was served, Mr Ganley issued a motion for judgment in default of defence against RTÉ. On the return date for that motion, RTÉ was ordered to deliver its defence within four weeks. Consistent with that order, RTÉ delivered its Defence on 15th November, 2012, still without having received replies to particulars identifying the words that were defamatory or that bore the meanings alleged by Mr Ganley. Unsurprisingly perhaps, RTÉ asserts in its Defence, at para. 4, that Mr Ganley *"fails to identify any specific words contained in the programme which are alleged to be defamatory of* [RTÉ]….[and] *has also failed to identify or particularise any specific words which are alleged to bear each or indeed any of the alleged meanings pleaded at paragraph 6 of the Statement of Claim"*. Indeed, in para 2 of its Defence, RTÉ "*denies that* [RTÉ]*…broadcast words defamatory of* [Mr Ganley]*…on 27th November 2008, as alleged or at all*". In para. 10 of its Defence, RTÉ states that "*Without prejudice to the foregoing, if, which is denied, the broadcast is defamatory of* [Mr Ganley]…[RTÉ] *pleads that the sting of the words in the programme, taken as a whole, was that [Mr Ganley]…had a tendency to make false or exaggerated claims in respect of business or other matters*". As touched upon elsewhere above, RTÉ then proceeds in some detail, at sub-paras. (a)–(g) of para. 10, to identify a detailed list of matters that it will rely upon in its defence in this respect. By notice for particulars dated 8th January, 2013, Mr Ganley sought particulars of the facts grounding each of the pleas made in the Defence that Mr Ganley has a tendency to make exaggerated claims. Detailed replies to particulars were furnished on 23rd April, 2013. Accordingly, Mr Ganley can have been left with no illusion as to the case that RTÉ would be making at the trial of the action and the factual matters which RTÉ would be relying upon.

64. As it happens, the reply to RTÉ's defence was also delivered on 23rd April, 2013. Paragraphs 2 and 3 of the reply states that "*2. In response to paragraphs 8, 9 and 10 of…*[RTÉ's] *Defence*, [Mr Ganley]*…contends that the alleged facts (which are denied) pleaded in those paragraphs do not sustain or support a plea of justification", and "3.* [RTÉ]*…is not entitled to seek to prove the truth of the allegations at paragraph 8, 9 and 10 of its Defence, in support of a plea of justification of meanings which* [Mr Ganley]*…has not pleaded*." In an affidavit sworn in support of Mr Ganley's Strike-Out Application #2, Mr Rooney, a partner in the firm of solicitors acting for Mr Ganley in the within proceedings, elaborates further on this aspect of matters, stating "*At paragraphs 8, 9 and 10 of its Defence*, [RTÉ]*…has sought to prove the truth of the meanings of the defamatory words complained of by Mr Ganley by reference to other alleged facts which are unconnected with the words in the broadcast complained of by* [RTÉ]". Given that Mr Ganley has never expressly identified the words alleged to be defamatory of him, there is an intrinsic flaw to this last-quoted assertion. But, that aside, is the assertion otherwise correct? The court turns now to consider the respective assertions of the parties in this regard before moving on to a consideration of applicable case-law and principle.

65. Mr Ganley maintains that RTÉ is not entitled to seek to prove the truth of the facts alleged in paras. 8 and 9 of the Defence in support of a general plea of justification; his basis for this assertion is that the facts pleaded in the said paragraphs are different facts from those which are contained in the broadcast and do not therefore meet the so-called 'sting' of the publication (and, in particular, do not meet the separate and distinct defamations that Mr Ganley contends that the impugned broadcast contained). When it comes to para. 10 of the Defence, Mr Ganley's complaint is that the impugned broadcast is not capable of bearing the meaning which RTÉ contends it to bear, viz. that Mr Ganley is a fantasist who has a tendency to make false and exaggerated claims in respect of business and other matters. Consequently, Mr Ganley contends, for RTÉ to prove the truth of the facts alleged in paras. 10(a)–(g) of the Defence would not afford it a successful plea of justification. All this being so, Mr Ganley now contends that, having regard to the meaning of the allegations contained in the impugned broadcast and to the criteria identified in O.19, r.27 of the Rules of the Superior Courts (1986), as amended, the court ought now to strike out paras 8–10 of RTÉ's Defence. (Order 19 of the Rules is headed "*Pleading Generally*" and O.19, r.27 provides that "*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 such case, if it shall think fit, order the costs of the application to be paid as between solicitor and client*").

66. RTÉ maintains that it is entitled to plead that the meaning it contends for is true and that Mr Ganley is well aware of the case that RTÉ is seeking to make and may meet that case as it chooses. Specifically:

> (i) RTÉ, in the first part of para. 8 of its Defence pleads an alternative meaning to meanings pleaded at paras. 6(c) and (d) of the statement of claim; it maintains that this meaning is capable of being borne by the broadcast and then indicates its intention to prove that this meaning is true both in substance and in fact;
>
> (ii) RTÉ acknowledges that the second part of para 8 of its Defence is more closely related to the allegation made by Mr Ganley at para. 6(g) of his statement of claim but that, again, the meaning it contends for is a viable alternative meaning to that pleaded by Mr Ganley in respect of the relevant portion of the broadcast;
>
> (iii) RTÉ does much the same in para. 9 of the Defence, pleading what it maintains is the real meaning that the impugned words are reasonably capable of bearing and which it intends to prove as substantially true (being that Mr Ganley, it is claimed, frequently exaggerated his role vis-à-vis the Latvian Government during the early stages of Latvia's recent re-establishment of its independence);
>
> (iv) as to Mr Ganley's contention that for RTÉ to prove the truth of the facts pleaded in paras. 10(a)–(g) of the Defence would not afford RTÉ a successful plea of justification, RTÉ, while asserting its right in any event to plead its Defence as it has, points to the fact that in, inter alia, the replies to particulars of 23rd April, 2013, quoted above, Mr Ganley himself states that ""*The entire programme was crafted with a slant…to create the clear impression in the minds of the viewer that* [Mr Ganley]*…was a shady individual….[a] fantasist who made up business dealings*", and thus that Mr Ganley himself acknowledges that the impugned programme has wider and more general meanings than those pleaded by Mr Ganley in his statement of claim; and
>
> (v) RTÉ maintains that the Prime Time programme possesses a common 'sting' which is that Mr Ganley is a person with a tendency to make exaggerated claims in respect of business or other matters, that this allegation and common sting can be proven to be substantially true and that it (RTÉ), in its Defence and replies to particulars, has, consistent for example with the decision of the Court of Appeal in *Lucas-Box v. Associated Newspapers Group plc and ors* [1985] EWCA Civ J1030–7, fully particularised the matters upon which it intends so to prove, that it has identified the alternative meanings which it intends to demonstrate as being the meanings that the impugned words bore, which meaning it maintains it will be able to prove are true in both substance and fact.[1]
>
> [1] In *Lucas-Box*, the plaintiff claimed that certain newspaper articles were defamatory of her, one for alleging that she lived with a ruthless killer and had been involved in serious criminality, the other for alleging that she had knowingly assisted terrorists and lied about her actions. After their defences had been served, the defendants sought and were granted leave to amend their defences so as to rely on a plea of justification. It was indicated that the extent of the justification would be that Ms Lucas-Box was careless in her choice of friends; later it was put in the form that she knew the man she lived with to be a terrorist. Unsuccessful in her initial appeal against, inter alia, the orders giving leave to amend, Miss Lucas-Box was thereafter successful before the Court of Appeal, that court holding that when a defendant seeks to rely upon a defence of justification, s/he must make it clear to the plaintiff exactly what defamatory meaning is claimed to have been justified. In the course of his judgment, Ackner L.J. observes at 7 that "*It is axiomatic that the function of pleadings is to define the issues between the parties, so that both the plaintiff and the defendant know what is the other side's case and thus everyone, counsel, judge and jury, are able to focus upon the real nature of the dispute. Although to some it may seem a startling observation, we can see no reason why libel litigation should be immune from ordinary pleading rules*", later adding, at 15, "*[T]he court should not, in our judgment, have hesitated in ordering the defendants so to plead their case that the plaintiff knew quite clearly what the defendants were purporting to justify. However, we would go even further and say that whatever may have been the practice to date, in future a defendant who is relying upon a plea of justification must make it clear to the plaintiff what is the case which he is seeking to set up. The particulars themselves may make this quite clear, but if they are ambiguous then the situation must be made unequivocal.*" In Ireland, one can see the application of Lucas-Box logic in the ex tempore judgment of the Supreme Court in *Leech v. Independent Newspapers (Ireland) Ltd.* (Unreported, Supreme Court, 10th February, 2006) in which a plea of alternative justification was struck out by the Supreme Court, not on the basis that the plea was impermissible, but on the basis that no material facts had been pleaded in support of it. (The decision appears to have been premised on an acceptance of the availability of the plea, at least in principle). The Supreme Court also ordered that the defence could be amended by the re-insertion of the plea of alternative justification, supported by particulars of the facts on which it was based and a pleading as to the meanings the impugned words were claimed to have.

(ii) Learned Authority.

67. It seems to the court that there are at least three ways in which the parties to defamation proceedings may disagree about the proper meaning of an impugned text.

68. First, a defendant may claim that a publication does not convey the meaning pleaded by the plaintiff but seeks to justify a different meaning that is capable of arising from the impugned publication.

69. Second, a defendant may argue that the multiple meanings of an impugned publication are not distinct but have a common sting, and that proving the truth of one or more aspects of the common sting will justify the entire publication.

70. Third, a defendant may contend that an impugned publication conveys one or more meanings in addition to that of which complaint is made, with the result that the plaintiff's reputation is not damaged by the imputation of which the plaintiff makes complaint. Although not so starkly presented in the argument at hearing, the first and second ways mentioned above are the ways in which RTÉ seeks to ground its defence to the within proceedings.

71. A defendant to defamation proceedings is entitled to justify a common 'sting' derived from parts of an impugned publication of which a plaintiff does not complain, insofar as the said parts are relevant to the meaning of the words that are complained of and to the 'sting' of the alleged defamation. The bar for judicial intervention as regards the form of such defence as is advanced in this regard is properly set high, not least but not only because a man ought not generally to be unduly ham-strung by courts or court procedures in how he wishes to defend himself from such attack as is made on him by way of litigation. Maher, in his learned text The Law of Defamation (2011), observes as follows:

> *"5-21 A defamatory statement may contain many allegations and imputations. The plaintiff may cite several, and the plaintiffs in pursuit of damages often claim there are numerous extremely damaging meanings in the published words. A defendant pleading a defence of truth is not obliged to agree with the plaintiff's contentions as to what meanings the published statement bears, and then go on to seek to prove the truth of the meaning the words can convey to a reasonable person. However, the defence of truth will not succeed if the court or jury finds the words capable of bearing a materially more serious meaning than the meaning which the defendant has justified. The defendant, therefore, takes a significant risk where he or she elects to prove the truth of a particular meaning, knowing that the plaintiff's meaning is capable of being held to be a reasonable one….*
>
> *5-23 The bar for judicial intervention in this context is set relatively high. In* Hamilton v. Clifford *[[2004] EWHC 1542…] Eady J. considered that he should intervene only when a meaning contended for was so implausible that it held the potential for a perverse outcome. Walsh J. in* Quigley v. Creation *[[1971] IR 269] said a 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'. In* Berezvsky v. Forbes *[[2001] EWCA Civ 1251…] the exercise was characterised by Sedley L.J. in the following way:*
>
> > *'The real question in the present case is how the courts ought go about ascertaining the range of legitimate meanings. Eady J. regarded it as a matter of impression. That is alright, it seems to us, provided the impression is not of what the words mean but of what a jury could sensibly think they meant. Such an exercise is an exercise in generosity not in parsimony. It is why, once fairly performed, it will not be second guessed on appeal by this court: the long stop is the jury.'*
>
> *5-24 Where the defendant denies that the words complained of carry the meaning the plaintiff contends for them, he or she must set out what meaning the defence attributes to the words. This is termed a Lucas Box meaning, from the 1986 judgment of the Court of Appeal in Lucas Box v. News Group Ltd [[1986] 1 WLR 147], in which it was held that as the normal rules of pleading required the parties to define the issues between them, a defendant relying on a plea of justification had to make clear the meaning to be attributed to the words that he was seeking to justify. Usually the defence will argue that, in their ordinary meaning, the words carry a less serious charge than the meaning being put forward by the plaintiff.*
>
> *5-25 A plaintiff is entitled to select from the defamatory statement the parts of which he complains, provided they can be separated from the rest for that purpose. As O'Connor L.J. stated in Polly Peck v. Trelford [[1986] 1 QB 1000 at 1032]:*
>
> > *'Where a publication contains two or more separate and distinct defamatory statements, the plaintiff is entitled to select one for complaint, and the defendant is not entitled to assert the truth of the others by way of justification.'*
>
> *5-26 However, a defendant may agree that the words selected and complained of by the plaintiff do not amount to a distinct allegation but share their meaning with other parts of the statement, and that the statement and the 'sting' it conveys should be seen as a whole:*
>
> > *'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…".*

72. When it comes to identifying the 'sting' of a publication for the purposes of the defence of truth and in the specific context of whether one is dealing with a collection of distinct allegations or, alternatively, various allegations which, taken cumulatively, amount to a general statement about a plaintiff, Cox and McCullough in *Defamation Law and Practice* (2014), make the following observations of interest, at 159-61:

"General and Specific Allegations

> *[5-37] A further area of concern in terms of assessing what the sting of the publication is, for the purposes of the defence of truth, is whether a publication is making a specific allegation or allegations about a defendant, or is instead making a general comment on his or her character. In other words, is the publication merely a collection of distinct allegations, or do these various allegations, taken cumulatively, amount to a general statement about the plaintiff.*
>
> *[5-38] The answer to this question will be relevant in determining what must be proved as far as the defence of truth is concerned. So, for example, if a publication refers to a plaintiff committing three known bank robberies, it may be seen as containing three separate allegations, all of which have to be proved, or alternatively as containing one single allegation, namely that the plaintiff is an inveterate and dangerous criminal, in which case that single allegation will have to be proved. Clearly also, the answer to the question of whether the publication contains a general or a specific allegation will be relevant in determining the type of evidence that the defendant will be allowed to adduce in support of his or her plea of truth.*
>
> *[5-39] A finding that the imputation involves a general allegation of bad character against the plaintiff will lead to a*

number of significant consequences, most of which tend to be beneficial from the defendant's standpoint:

First, it will mean that, whereas the defendant must prove more than the truth of a single specific allegation contained in a publication, equally, s/he may not have to prove the truth of every allegation contained therein provided that the general sting is established.

Secondly, it will mean that the defendant will be permitted to adduce a good deal of evidence unconnected to any specific allegations within the publication that may have the effect of seriously reducing the reputation of the plaintiff in the eyes of the jury, and may thereby impact both on its finding on liability and more especially on the quantum of damages awarded. On this basis, under the former law, evidence of specific acts of misconduct when admitted in support of a plea of truth were taken into account in mitigation of damages, notwithstanding the general rule excluding such material for that purpose.

[Court Note: This last sentence refers to the fact that where there is a failed plea of justification, it has always been the law that a jury is entitled to take into account what it regards as having been true, if it considers that what it has found is true is appropriately mitigatory of such damages as a plaintiff would otherwise fall to receive.]

However, as noted elsewhere, the 2009 Act has increased the ability of a plaintiff to adduce general evidence of misconduct outside of the context of a plea of truth, so that this consideration is now of less importance for a defendant.

[Court Note: As the within proceedings are not brought under the Act of 2009, this last point appears not to benefit RTÉ].

It seems clear that, just as it will not be possible to refer to general matters in order to prove a specific allegation against a plaintiff, so also it is not possible to prove a general allegation by reference to one instance of misconduct. So, for example, just as an allegation that the plaintiff was involved in a well-known bank raid will not be proved by evidence that s/he had criminal tendencies, so also a general allegation that the plaintiff was dishonest will not necessarily be proved by reference to one single instance of robbery. This is because it is not a foregone conclusion that a person who commits an offence once thereby bears the characteristics of a person who habitually commits this kind of offence, and it is a dangerous business for a publisher to make such a connection.

[Court Note: Another example would be to describe a journalist as a 'libellous journalist' simply because s/he has at one time been found to have committed defamation.]

Moreover, whereas it may be possible to justify a general allegation of bad character by reference to events that have occurred since publication, this will not be possible where what is at stake is a specific allegation in respect of a specific event.

[Court Note: As the court understands matters, all of the events raised by RTÉ occurred before publication.]

Finally, as we have noted, the plaintiff is normally entitled to sue for whatever specific allegations s/he wishes and to ignore any allegations in the publication; however, this type of extraction is not possible where the whole publication contains a general and common sting pleaded by the plaintiff."

73. Looking to our neighbouring jurisdiction, Gatley on Libel and Slander (12th ed.) notes at para. 27.8 that "*Where a claimant complains that words are defamatory of him in their natural and ordinary meaning, the defendant is entitled to justify those words in any meaning which those words are capable of conveying to a reasonable man*", the learned authors relying in this regard on the observation of Purchas L.J. in *Prager* v. Times Newspapers Ltd [1988] 1 WLR 77, 86, that "*it is still open to a defendant to plead so as to justify any reasonable meaning of the words published which a jury, properly directed, might find to be the real meaning….At the heart of this case, of course, is the proposition which asserts that the scope of the defence of justification should not depend upon the way the plaintiff pleads his case, but on the meanings which the words published are capable of bearing*." Although a defendant is not entitled to select for justification a separate and distinct charge which the plaintiff has not pleaded, a defendant can, in respect of a distinct charge which the plaintiff has pleaded, justify that charge by reference to a different meaning.

(iii) Applicable Case-Law.

74. The court has been referred to various authorities in the course of Mr Ganley's Strike-Out Application #2. Some of these have been touched upon already above; the court proceeds to consider a number more below.

a. *Templeton v. Jones*

[1984] 1 NZLR 448

75. Templeton involved an appeal to the New Zealand Court of Appeal from a refusal of a trial judge to strike out a defence of qualified privilege. The difficulty with Templeton is that while it does not necessarily recite inappropriate principles, it is strongly criticised in *Polly Peck* (considered below); moreover, one 19th-century decision of the English courts which is relied upon in Templeton, that of *Brembridge v. Latimer* (1864) 12 WR 878 (also considered below) is found in *Polly Peck* to have been wrongly decided. The criticisms levelled at Templeton in *Polly Peck* but, more particularly, the reliance it places on an English case that has since been identified by the English courts as having been wrongly decided has the result that this Court respectfully declines to rely on *Templeton*.

c. *Polly Peck plc v. Trelford*

[1986] QB 1000

I. The Decision in *Polly Peck*.

76. *Polly Peck* was a case arising from newspaper reportage concerning a textile enterprise that would later feature in one of the great corporate scandals of the Thatcher Era in the United Kingdom. Among the plaintiffs were Mr Asil Nadir, who would subsequently

flee to Northern Cyprus, following the collapse of *Polly Peck*, returning to the United Kingdom two decades later to face successful prosecution for various theft offences. This case preceded that eventual collapse and involved a libel claim arising from allegations of what might broadly be described as 'corporate mis-governance' that were made in a trio of articles published in the Observer newspaper during 1983 and to which varying objection was taken by the individual plaintiffs. The defendants pleaded fair comment and justification, the particulars of which tended to support the whole of the three newspaper articles, including assertions in the latter two of which no complaint was made. The plaintiffs applied to strike out those particulars which supported assertions of which they did not complain. The application was dismissed by the master, dismissed on appeal to the judge in chambers and dismissed again on appeal to the Court of Appeal. In the course of his judgment, O'Connor L.J., at 1020-21 identifies a number of principles of note in the context of the application now presenting:

> *"[1] 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: this is unchallenged and has been the law for well over 150 years. What use is the jury permitted to make of the material now in evidence?*
>
> *There is no doubt that they can use it to provide the context to the words complained of when considering whether any, and if so what, defamatory meaning is disclosed. A classic example of the context deciding the meaning of words to be different to their face value meaning is found in Thompson v. Bernard (1807) 1 Camp. 47, a slander action where the plaintiff complained that the defendants said of him: 'Thompson is a damned thief; and so was his father before him; and I can prove it.' The evidence was that the defendant added: 'Thompson received the earnings of the ship, and ought to pay the wages.' Lord Ellenborough CJ directed a non-suit on the ground that it was clear from the whole conversation that the words did not impute a felony, but only a mere breach of trust.*
>
> *What other use can be made of the material depends on its nature and on the defences put forward by the defendant.*
>
> *[2] 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.*
>
> *[3] 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.*
>
> *[4] 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."*

II. The Decision in *Brembridge*.

77. *Polly Peck* is also notable because of its disavowal of the long-ago decision in *Brembridge*. This aspect of *Polly Peck* has assumed a certain importance in the within proceedings because the court has been invited by counsel for the plaintiff to rely, inter alia, on the decisions of the New Zealand Court of Appeal in Templeton and of the High Court of Australia in *Chakravarti* (considered below), decisions which rely in part on *Brembridge*, a decision of the English courts, as having been rightly decided, whereas in *Polly Peck* it was realised and acknowledged that *Brembridge* had been wrongly decided, and there has been no retreat from that conclusion by the English courts in the years since *Polly Peck* itself was decided. Per O'Connor LJ at 1021–1024:

> *"It is the 'sting' of the libel to which the defences of justification and fair comment are directed. The fourth plaintiff says that he is entitled to pick the allegations of fact and comment on the Niksar project in the first article as providing the sting alleged, but that the defendants are not entitled to rely on any other allegations of fact and comment in the article which justify that sting or alternatively are fair comment.*
>
> *The cases relied upon in support of this proposition start with Brembridge….When all reports are examined, it is possible to put together a summary of the background to the publication of the libel….*
>
> *At all material times Barstaple returned two members to Parliament. From 1836 to 1841 the plaintiff acted as election agent to Mr Hodgson, one of the members, who was a Conservative. From 1841 to 1847 he was agent to the two sitting members, both Conservatives, Mr Hodgson and Mr Gore. At the election of 1847 Hodgson and Gore decided to fight for seats independently. The plaintiff refused to act as agent for Hodgson and, when Gore withdrew, himself entered the lists as a candidate. In the result the plaintiff was elected to one seat in the Conservative interest and the other seat was gained by the Liberal. At the election of 1852, the plaintiff and Sir William Fraser fought the seats in the Conservative interest and were both returned, but in the following year they were unseated for bribery by their agents. A commission was appointed to inquire into the election and acquitted the plaintiff of all personal cognizance of the bribery. In 1863 one of the sitting members died, and the plaintiff and another were candidates at a by-election. It was during the run-up to that election that the article was published by the defendant in the newspaper. One can infer that the article was a full-blooded attack on the plaintiff to try and demonstrate that he was wholly unsuitable to act as a member for Barnstaple. It said that he had been kicked out of the House of Commons for bribery, and charged him with base desertion of his old client and benefactor Hodgson. The paragraph in the article which formed the basis for the plea in the first count in the statement of claim read:*
>
> > 'Hodgson, who was his client and representative for so many years, did not get very generous treatment from him in the day of adversity. Hodgson had spent £80,000 in and on the borough. *Brembridge*, the convicted briber, was his agent, and when Hodgson's money was all spent, and he had the weakness to imagine his ruin gave him a claim on the sympathy of those who had revelled in his ill-dispensed means, he was ignominiously flouted and sent off with scorn and contumely. Thus he was treated, not because he was unworthy to represent the borough, but because no man had any right to claim the assistance of *Brembridge* the briber unless, like Roderigo [who opened his purse to Iago in the mistaken belief that Iago was using it to advance Roderigo's designs on Desdemona], he had put money in his pocket.'

The plaintiff framed his count by omitting the words 'the convicted briber' and the words 'the briber.' The count appears in full at 10 LT 816:

> 'Hodgson (meaning the said Frederick Hodgson), who was his (meaning the plaintiff's) client and representative for so many years, did not get very generous treatment from him (meaning the plaintiff) in the day of adversity. Hodgson had spent £80,000 in and on the borough (meaning the borough of Barnstaple). *Brembridge* (meaning the plaintiff) was his agent, and when Hodgson's money was all spent, and he had the weakness to imagine his ruin gave him a claim on the sympathy of those who had revelled in his ill-dispensed means, he was ignominiously flouted and sent off with scorn and contumely. Thus he was treated, not because he was unworthy to represent the borough, but because no man had any right to claim the assistance of *Brembridge* (meaning the plaintiff), unless, like Roderigo, he had put money in his pocket (meaning that the said Frederick Hodgson had been ignominiously flouted and sent off with scorn and contumely by the plaintiff at the last-mentioned election, and that the plaintiff had basely deserted the said Frederick Hodgson, and refused to act as his agent or to render him any assistance or support at such election, because the said Frederick Hodgson had then become impoverished in his circumstances).'

The reports tell us that the statement of claim contained three further counts alleging separate libels of a like nature found in the same article.

The defendant entered a general plea of not guilty. The defendant then wished to enter a long plea of justification….The gravamen of the pleas was that the omission of the words from the passage complained of had altered the sense and meaning of the passage, and he then went on to plead that the meaning of the words in their context was that the plaintiff had been guilty of bribery and of base desertion of his old client and benefactor Hodgson. As I read the judgments in the three reports (and there are certain differences in what is reported) it was accepted that the article as a whole would be before the jury, including the passage complained of, unexpurgated. Again as I understand the case, it would remain open to the defendant to justify the meaning put upon the alleged defamatory words in the statement of claim, but the court held that the plea of justification as drafted should be struck out on the ground that it was embarrassing. Byles J. is reported as saying, 12 WR 878, 879-880:

> 'The law is plain that, if you wish to dispute the sense given to the words in the libel, you must do so by the plea of not guilty, and, if you wish to justify, you must confess and avoid….Now, the issue raised by these pleas is plainly calculated to prejudice the plaintiff, who has a right to have the charge of 'treachery' tried, and not to be compelled to take part in an irrelevant inquiry.'

It is necessary to transpose the facts of Brembridge…into modern times. Today we have the requirements of R.S.C., Ord. 82, r.3, which requires a defendant to give particulars of the facts and matters relied upon where a defence of justification or fair comment is pleaded. In cases where the plaintiff relies on the natural and ordinary meaning of words and pleads a false innuendo, the defendant is entitled to justify the words in any meaning that it is open to the jury to find that the words bear, and I do not see why the defendant should not plead that in their context the words are true. Assume for a moment that the sentence in Thompson v. Bernard [a slander case]… has been published as a libel, and the plaintiff complained solely of the words 'Thompson is a damned thief;' it would be an astonishing thing if the defendant were unable to plead that in their context the words were true in substance and in fact, and give particulars of the facts alleged in the rest of the sentence, namely that the plaintiff had received the proceeds of the ship and failed to pay the wages. The reason for this is that quite plainly in their context the sting is not that the plaintiff was a thief, but that he had behaved discreditably in taking the proceeds of the voyage and not paying the crew.

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. It seems to me that this is exactly what the plaintiff in Brembridge…succeeded in doing, because I think that a jury might well have concluded that the passage as published in its natural and ordinary meaning meant that Brembridge was a corrupt, unreliable, heartless man unfit to be a Member of Parliament, as opposed to the innuendo relied upon which I have set out earlier in this judgment.

Brembridge…was considered by Blackburn J. in Watkin v. Hall (1868) LR 3 QB 396, 402. This was a slander action, the facts of which are unimportant. The court was concerned with the pleadings, and Blackburn J., considering the effect of section 61 of the Common Law Porcedure Act 1852, said:

> 'It follows, then, that the defendant may plead a justification as to the words with the meaning in the innuendo, and also as to them without the meaning. I think the decision in *Brembridge*…correct, because in that case a portion of a newspaper article being set forth in the declaration, with an innuendo, the defendant endeavoured to shew that if the whole article was taken, the plaintiff would have had a different cause of action, and he sought, by his plea, to set out the whole article, and, so, to justify it as true in fact. That was a matter utterly irrelevant to the question at issue, whether he had published the libel charged in the declaration. The Court of Common Pleas refused to allow the plea.'

The court had the case cited from the Weekly Reporter, from which report it is difficult to spell out what had really happened in Brembridge…and I am satisfied that Blackburn J. had not appreciated the real nature of the defendant's complaint. In the result the opinion of that great judge that Brembridge's case was correct ceases to be persuasive. In my judgment that case was wrongly decided."[1]

[1] It also appears to have been mis-named; the case was in fact brought by the sometime Member of Parliament for Barnstaple, Richard 'Bremridge'.

78. The 'blue pencilling' to which O'Connor LJ refers finds echo in the more recent decision of the Court of Appeal in *Warren v. Random House Group Limited* [2008] EWCA Civ 834, a libel action brought by Frank Warren, the well-known boxing promoter in respect of certain statements made in the autobiography of Ricky Hatton, the renowned welterweight and light-welterweight boxer, in which Clarke MR (joined by May and Wilson LJJ) observes, at para. 102, that *"[A] defendant is entitled to justify a common sting derived from parts of a publication, taken as a whole, of which the claimant does not complain, insofar as they are relevant to the meaning of the words complained of and to the sting of the alleged libel. The claimant is not entitled to use a blue pencil on the words published of him so as to change their meaning and then prevent the defendant from justifying the words in their unexpurgated form. Whether a defamatory statement is separate and distinct is a question of fact and degree in each case. The*

action should concern itself with the essential issues necessary for a fair determination of the dispute between the parties."

c. *Khashoggi v. IPC Magazines Ltd*

[1986] 1 WLR 1412

79. Ms Khashoggi, a prominent socialite, obtained an injunction against Woman's Own magazine from further publishing an article alleging that she had an adulterous affair with the president of a foreign nation. A discharge of this injunction was subsequently sought on the basis that it was intended to justify the 'sting' of the article as a whole. On appeal, the Court of Appeal allowed the discharge of the injunction on the basis that the defendant intended to justify the common 'sting' of several allegations in the article (that 'sting' being one of promiscuity), even though it might not be possible to prove the particular facts of the allegation in respect of which the injunction had been granted. Donaldson MR., giving judgment for the court, observed as follows, at 1417-8:

> *"Let us start with the decision of this court in Polly Peck…where O'Connor LJ sets out the relevant parts of the law of the defence of justification. He said, at p. 869:*
>
> > 'Where a publication contains two or more separate and distinct defamatory statements, the plaintiff is entitled to select one for complaint, and the defendant is not entitled to assert the truth of the others by way of justification.'
>
> *Applying that to this article, the plaintiff was entitled to select this allegation that she had an affair with the president of a friendly foreign state and to complain of that notwithstanding that she makes no complaint of the various other allegations of a not dissimilar nature made in the same article.*

The judgment of O'Connor LJ went on:

> *'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.' (I think he means in the publication itself).'*
>
> *What is said here is that that principle can be applied and the sting of the article is promiscuity generally. It is submitted that it would be very difficult for the plaintiff, when her statement of claim comes to be prepared, to make any complaint about this particular allegation which could not equally be made about the other allegations contained in the same article. In those circumstances the Polly Peck principle applies and, notwithstanding that the defendants may not be able to prove the particular affair complained of, they will be able to adduce evidence which will justify the sting of the article and the sting of that statement on the footing, I suppose, that it is not more defamatory to have an extra-marital affair with one person rather than another in the circumstances of this case.*
>
> *However, it is not for us as I think to decide whether that is true and what the Jury would make of it, because it is clearly a Jury case. We have to apply the Bonnard v. Perryman principle….".*
>
> *[In Bonnard v. Perryman [1891] 2 Ch. 269, a classic 19th-century English authority, Coleridge CJ, reading a judgment in which Esher MR and Lindley, Bowen and Lopes LJJ concurred, observed as follows, at 284:*
>
> > "The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed; but on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions. We entirely approve of, and desire to adopt as our own, the language of Lord Esher MR in *Coulson v. Coulson* (1887) 3 TLR 846– 'To justify the court in granting an interim injunction it must come to a decision upon the question of libel or no libel, before the jury have decided whether it was a libel or not. Therefore the jurisdiction was of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the court would set aside the verdict as unreasonable."
>
> This Court would but respectfully observe that the right of free speech, or the right to freedom of expression of which it is an associate or sub-set, is not merely a right which it is "for the public interest that individuals possess" but a right which individuals inherently possess by virtue of their human existence, a right which is reflective of the fundamental concepts of human dignity and self-fulfilment, and a right which is recognised by Article 40.6.1º.i of the Constitution and Articles 9 and 10 of the European Convention on Human Rights, albeit that both Constitution and Convention anticipate that some level of lawful restriction may apply.]

80. Donaldson MR, in *Khashoggi*, continues, at 1418:

> "I cannot see why it [the *Bonnard v. Perryman* principle] should not be applied. Quite apart from any question of public interest in the freedom of the press, there is a much wider principle which covers it, and that is this. The injunctive powers of the court can only be invoked in support of a right or in defence of an interest. If the *Polly Peck* defence were to succeed the plaintiff would have no right. She therefore cannot expect to have it defended. That does not of course answer the question which arises as to how likely she is to succeed. That is a problem which always arises in libel and elsewhere. The point is that Bonnard…apart from its reference to freedom of speech, is based on the fact that the courts should not step in to defend a cause of action in defamation if they think that this is a case in which the plea of justification might, not would, succeed. I see no reason why that principle should be confined to justification in its primary meaning as compared with justification in an extended sense, the *Polly Peck* sense."

81. The proper regard shown in *Khashoggi* and *Bonnard* to the important role of the jury in defamation cases is an aspect of those decisions which has a very real resonance in the context of an application to strike out parts of the defence in a defamation action. As mentioned above, as a matter of principle, if an article is capable of bearing an alternative meaning to that contended for by the plaintiff in a defamation action, then the defendant ought to be and is entitled to have that meaning considered by the jury, provided

of course that the impugned article is capable of bearing the alternative meaning. The court includes the last proviso because it is ever a function of the judge in defamation proceedings to decide that an article is incapable of bearing a particular meaning and that a matter need not go to the jury. But once it is capable of bearing that meaning it is a matter for the jury to decide whether in fact it bears that meaning.

d. *Williams v. Reason*

[1988] 1 WLR 86

82. The decision of the Court of Appeal in Williams is best seen, and was later described by Ralph Gibson LJ in Bookbinder (considered below), at 650 as "*an example of the application of established principle to the widely varying circumstances of particular cases*". In that case the alleged defamation was that a prominent Welsh Rugby international player had abused his amateur status by writing a book for money and so was guilty of so-called 'shamateurism'. The defendants pleaded justification, and conflicting interpretations of the applicable sporting rules were advanced, with the trial judge suggesting to the jury that the plaintiff's interpretation was correct in terms that, to borrow from the later judgment of Stephenson LJ in the Court of Appeal, at 106, "*gave them* [the jury*] little room for rejecting his view unless they left common sense behind them and sacrificed simplicity for some improbably complicated alternative*". The defendants appealed successfully, Stephenson LJ noting, at 101-2, and it is perhaps worthy of further note by this Court in the context of the within proceedings that "*[N]o plea by the plaintiff of a wider meaning is necessary to enable the defendants to introduce evidence of other infringements of his amateur status [i.e. other facts capable of justifying defamatory words in a wider sense than as pleaded by the plaintiff], provided that the words that the defendants seek to justify are capable of bearing that wider meaning*."

e. *Bookbinder v. Tebbit* (No. 1)

[1989] 1 WLR 640

83. Like Williams, the decision of the Court of Appeal in Bookbinder is perhaps best regarded as a case which was decided very much on its own facts. Indeed this is effectively acknowledged at p.649 of the judgment of Ralph Gibson LJ where he states that "*In my view, on the essential question as to the possible meanings of the words used in this case, those cases [including, inter alia, Khashoggi]…provide little if any assistance, and this is not surprising because the relevant principle applicable in this case is not in issue between the parties and the application of the principle by the court to one set of facts can rarely be of direct assistance in applying it to different facts*".

84. In *Bookbinder*, the defamation proceedings arose from a public speech given by the well-known Conservative Member of Parliament and sometime Cabinet Minister, Mr Norman Tebbit (now Lord Tebbit), during the course of a by-election held in West Derbyshire back in 1986. In his speech, Mr Tebbit stated, inter alia, that "The £50,000 spent on printing anti-nuclear statements on county schools stationery was a 'damn fool' idea. I hope that Councillor David Bookbinder has also told the Russians of Derbyshire's nuclear-free policy. If not, it is arguable that he has lost £50,000 on this damn fool idea on school notepaper". An attempt in the course of the action for defamation that was later brought by Mr Bookbinder to plead as justification that Mr Bookbinder had squandered funds in a number of other unrelated matters was struck out on the basis that the clear impression formed of the words used was that the ordinary man would regard the defamation (if any) arising in the impugned words to be limited to the spending of the stated sums on the stated project as opposed to anything broader. Per Ralph Gibson LJ at 646:

> *"It has not been, and could not be, suggested that a particular charge of wrongdoing necessarily may be regarded by the jury in all cases as including a general charge of that sort of wrongdoing. Even where a defendant has published two distinct libels about a plaintiff the law permits the plaintiff to complain of one only, and to have that issue decided, and the law does not permit that defendant to justify the one of which complaint is made by proving the truth of the other. Nor does the law permit a defendant to lead evidence of particular acts of misconduct on the part of the plaintiff in mitigation of damages where the defendant has failed to justify the libel complained of: see Speidel v. Plato Films Ltd [1961] AC 1090; but the two libels must be distinctly severable into distinct parts and, if they are not, the plaintiff cannot pick and choose between them: see Polly Peck…at page 1025",*

continuing, at 648 et seq:

> *"The question as to the width of the conceivably proper meaning of the words used is therefore to be answered on the material before this court by reference to the words themselves spoken at a public meeting in support of a candidate in a by-election and spoken of a councillor, who was the leader of the controlling majority of the council. If the court is to say that these words, by their own force and in that context , may properly be held to contain a general charge of squandering public money, then it seems to me that we would be very close to holding that it is open to a jury, at least with reference to a person holding elective office and of known political views, to find that any specific charge against him of wrongdoing, based upon specific stated facts, imports a general charge of preceding similar wrongdoing which may be justified by different specific facts….*
>
> *[Counsel] argued that to hold that the words cannot properly bear the wider meaning would be to prevent ventilation at the trial of the real issue, namely whether or not there had been squandering of money, left right and centre, by the council under the leadership of the plaintiff. He said that assistance could be found in support of the plaintiff's contention that the words import a sting of a general nature from the decision of the court in the cases of Khashoggi…and that two cases, London Computer Operators Training Ltd v BBC [1973] 1 WLR 424 and Williams v. Reason (Note) [1988] 1 WLR 96 were 'on all fours with this case'.*
>
> *"In my view, on the essential question as to the possible meanings of the words used in this case, those cases… provide little if any assistance, and this is not surprising because the relevant principle applicable in this case is not in issue between the parties and the application of the principle by the court to one set of facts can rarely be of direct assistance in applying it to different facts….*
>
> *Finally, as to Williams v. Reason….[a]gain, in my view, that case was an example of the application of established principle to the widely varying circumstances of particular cases….[though] [f]or my part I regard that case as far stronger than this for the purpose of finding in the words used a general charge – in that case of 'shamateurism', by reference to a particular example, namely the writing of a book for money."*

85. In *Bookbinder*, as seen above, there was no general allegation made by Mr Tebbit; it was a case which dealt with one allegation that £50,000 had been mis-spent and the court would not allow a wider allegation to be canvassed. And, whether or not one agrees with the last-quoted observation of Ralph Gibson LJ as to Williams being a stronger case in which to find a general charge from the particular example referenced, it is undoubtedly the case that the within proceedings can reasonably be contended to be non-Bookbinder style proceedings where the nature of the defamation alleged is not precise and narrow but rather a case of multiple thematic allegations with the common 'sting' being that Mr Ganley is a fantasist when it comes to his purported business experiences.

f. *Chakravarti v. Advertiser Newspapers Limited*

(1998) HCA 37

86. This was a decision of the High Court of Australia in which the defendants pleaded, inter alia, that certain impugned newspaper articles bore a meaning that was different from those pleaded in the amended statement of claim. The decision of the High Court (or, at least, the dicta of Brennan CJ and Mc Hugh J., which, perhaps notably, did not receive express endorsement from other members of the Court) involves a flat rejection of the reasoning in *Polly Peck*, the Court observing as follows, at 3–5:

> "[6] The second matter arising…concerns a defendant pleading and justifying meanings which the plaintiff has not pleaded. Since the decision of the English Court of Appeal in *Polly Peck*…courts in England and Australia have sanctioned a practice of permitting a defendant to plead a meaning different from that contended for by the plaintiff and then justifying that different meaning.
>
> [7] The authority for this practice is found in the judgment of O'Connor LJ in *Polly Peck* where his Lordship said:
>
> '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 RSC, O82. It is fortuitous that some or all of those facts and matters are culled from parts of the publication of which the plaintiff has not chosen to complain.
>
> Where a publication contains two or more separate and distinct defamatory statements, the plaintiff is entitled to select one for complaint, and the defendant is not entitled to assert the truth of the others by way of justification.
>
> 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.
>
> What I have said in the context of justification can be applied by a parity of reasoning to fair comment, subject to what I say at the end of this judgment.'
>
> [8] With great respect to his Lordship, such an approach is contrary to the basic rules of common law pleadings and in many contexts will raise issues which can only embarrass the fair trial of the action. Leaving aside technical pleas such as pleas in abatement, defences are either by way of denial or confession and avoidance. A defence which alleges a meaning different from that of the plaintiff is in the old pleading terminology an argumentative plea of not guilty. Under the principles of pleading at common law, it could tender no issue and would be struck out as embarrassing. Under the modern system, articulating an alternative meaning could conceivably make explicit the ground for denying a pleaded imputation. But it would be only in such a case that a defendant's plea of a new defamatory meaning might be supportable as a plea which prevents the plaintiff being taken by surprise. A plea of justification, fair comment or qualified privilege in respect of an imputation not pleaded by the plaintiff does not plead a good defence. It is immaterial that the defendant can justify or otherwise defend the meaning which it attributes to the publication. In our view, the *Polly Peck* defence or practice contravenes the fundamental principles of common law pleadings. In general it raises a false issue which can only embarrass the fair trial of the actions. This was the view of the Court of Common Pleas in *Brembridge v. Latimer*. In *Brembridge* Byles J., a common law judge of great authority, said:
>
> 'The law is plain that, if you wish the dispute the sense given to the words in the libel, you must do so by the plea of not guilty, and, if you wish to justify, you must confess and avoid Now, the issue raised by these pleas is plainly calculated to prejudice the plaintiff, who has a right to have the charge of 'treachery' tried, and not to be compelled to take part in an irrelevant inquiry.'
>
> [9] A similar view was taken by Blackburn J., another great common law judge, in *Watkin v. Hall* [(1868) LR 3 QB 396] where his Lordship said [at 402]:
>
> 'I think the decision in *Brembridge v Latimer* correct, because in that case a portion of a newspaper article being set forth in the declaration, with an innuendo, the defendant endeavoured to shew that if the whole article was taken, the plaintiff would have had a different cause of action, and he sought, by his plea, to set out the whole article, and, so, to justify it as true in fact. That was a matter utterly irrelevant to the question at issue, whether he had published the libel charged in the declaration. The Court of Common Pleas refused to allow the plea.'
>
> [10] *Brembridge* was applied by the Court of Appeal of New Zealand in *Templeton*….Cooke J., speaking on behalf of the Court, said [at 452]:
>
> 'In the present case, however, the allegation that the plaintiff despises Jews is not reasonably capable of being treated as other than a distinct charge. It is obviously different, for instance, from the allegation that he despises women. It is true that many of the allegations in the passage quoted in par 5 of the statement of claim are variations on or illustrations of a theme: namely that the plaintiff indulges in the politics of hatred. They are specific and severable allegations nonetheless. It is important to note that the plaintiff is not suing on all the words set out in par 5. In par 6 it is made clear that only the allegation about Jews is sued on. The defendant on the other hand,

> as is made plain by the opening words of par 7 of the amended statement of defence, wishes to prove that all the words set out in par 5 of the statement of claim are true. That is not permissible, because of the limited nature of the plaintiff's complaint.'
>
> [11] This passage highlights what we regard as the fundamental defect in the reasoning in *Polly Peck*. Cooke J. rejected the notion that the defendant can take severable parts of a publication each containing defamatory imputations, link them together, and give the publication a meaning at a sufficiently high level of abstraction to subsume the meanings of the severable parts. That is, a defendant cannot take part of an article that wrongly alleges that the plaintiff has convictions for dishonesty and a part that imputes that the plaintiff has defrauded shareholders, assert that the article means that the plaintiff is dishonest, and then justify that meaning, perhaps by proving that the plaintiff had in fact defrauded the shareholders. On that hypotheses, it would be outrageous if the defendant could obtain a finding that the article was true in substance and in fact plainly when it was not. Yet that is the sort of finding that must result from applying the central proposition of *Polly Peck*. That proposition is that [per O'Connor LJ at 1032]:
>
> '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.'"

87. Assuming that the above-quoted dicta of Brennan CJ and McHugh J. enjoyed the endorsement of other members of the High Court, it is clear from the foregoing that there is no 'half-way' house between *Polly Peck* and Chakravarti; they are polar opposites; inclining to one involves moving away from the other. So far as *Chakravarti* relies on *Brembridge*, the court cannot but note that *Brembridge*, an English case, was found by the Court of Appeal in *Polly Peck*, a later English case, to have been wrongly decided – and the fact that it was wrongly decided must taint cases, such as Watkin, that arose for decision post-*Brembridge* and pre-*Polly Peck*, and which relied on the flawed decision in *Brembridge*; *Templeton*, as mentioned above, suffers from the same deficiency. Given that the decision in *Chakravarti* appears to rest in part on *Brembridge*, *Watkin* and *Templeton*, that necessarily makes it a decision that is, with every respect, less attractive as a precedent for this Court to place reliance upon.

88. It seems to the court that at this juncture the following observations might usefully be made, based on its consideration of applicable law and authorities to this point.

> – first, fairness of procedure requires that each party to defamation proceedings must have an equal opportunity to present its case within the particular context of an impugned publication.
>
> – second, parties in defamation disputes often disagree about what a publication means. Dealing effectively with such disagreements is important in arriving at a system of defamation litigation that is equitable, efficient and expeditious.
>
> – third, if a plaintiff contends for a particular meaning, it is generally necessary, if justice is to be done, that a defendant be allowed to plead an alternative meaning which the defendant intends to justify; of course this alternative meaning must be confined to the impugned publication, subject to context. Otherwise a plaintiff's legal advisors could, through cleverness or clumsiness, secure an unwarranted procedural and substantive advantage by pleading one or meanings which do not properly or fully convey the true meaning of the impugned publication.
>
> – fourth, the tort of defamation is intended to provide a remedy for a person whose reputation has indefensibly been injured by the publication of something disparaging of that person's good name; in essence, it 'boils down' to determining what an impugned publication means.
>
> – fifth, it follows that the most effective and fair approach to the defence of truth must be focused on the substance of an impugned publication.
>
> – sixth, the importance of the defence of truth is such that a failure by the law to deal with it well will inevitably increase technical arguments about meaning, diverting attention unhelpfully from an impugned publication to the lawyer's pleading of the alleged imputations.
>
> – seventh, plaintiffs in defamation actions face lesser hurdles than in other civil actions, such as, for example, the tort of malicious falsehood; as a result the defences to defamation assume a commensurately greater importance, as does the judicial approach to them being such that a defendant is not unduly and unnecessarily hamstrung in defending himself to the optimal extent possible from an allegation of defamation.
>
> – eighth, Chakravarti, by focusing on the basic rules of common law pleadings is perhaps, and with every respect, vulnerable to criticism for not acknowledging sufficiently that defamation is different from some other civil litigation and that its special character may justify a particular approach to pleading (à la *Polly Peck*); the practices of past times must ever yield to the necessities of the prompt and frugal disposition of litigation.

89. To the extent that the court is free to choose between *Polly Peck* and Chakravarti, and the trend of case-law in Ireland appears in any event to favour a *Polly Peck* 'world-view', the last-mentioned point inclines this Court still further to prefer *Polly Peck* over *Chakravarti* as representing the correct means of adjudicating upon the issues now presenting, and it can also reasonably be contended and concluded that *Polly Peck* offers the best means of attaining such other objectives as the court has touched upon in the foregoing observations.

g. *Cooper Flynn v. RTÉ*

[2000] 3 I.R. 344

90. Ms Cooper Flynn brought a libel action against RTÉ and other defendants following the airing of television reportage which alleged that she had induced the third defendant and others to participate in a tax evasion scheme being facilitated by the bank where Ms Cooper Flynn then worked. The case attracted some prominence because, inter alia, Ms Cooper Flynn had subsequently been elected a member of Dáil Éireann. The first and second defendants had at an earlier stage been granted non-party discovery of documentation that related to the alleged scheme, but with the names of the scheme participants excised. They returned to court seeking the disclosure of the names which had been withheld at that earlier stage. All of the defendants had pleaded justification and it was argued, inter alia, for the bank that such a plea ought not to have been entered if the defendants did not have the evidence

to support that plea at the time of making their defence (and that, in effect, discovery should not now be used to make good on that plea). This argument was rejected by Kelly J., who considered that the fact that there was a plea of justification in circumstances where it was not suggested that such plea had been improperly made did not dis-entitle the first and defendants from seeking support for their case in such documents as were revealed in the course of discovery. In reaching this conclusion, Kelly J endorsed the observation of Lord Denning MR in *Assoc. Leisure v. Assoc. Newspapers* [1970] QB 450, 456 (with both conclusion and observation later being endorsed by Macken J. in Desmond (considered below) that "Like a charge of fraud, [counsel] must not put a plea of justification on the record unless he has clear and sufficient evidence to support it".

91. Though *Cooper Flynn* is clearly a judgment of significance in its own right, it was acknowledged by counsel for RTÉ, when mentioning it before the court that it was of "tangential relevance" to the issues at hand; in truth it does little to advance the resolution of the within application for the court does not understand there to be even a whiff of a suggestion of impropriety that RTÉ, acting under legal advice, has pleaded justification as it has.

h. *Carlton Communications plc and anor v. News Group Newspapers Limited*

[2001] EWCA Civ 1644

92. In three editions of the *News of the World newspaper*, articles and leaders were published alleging that a number of programmes by the well-known television investigative reporter, Roger Cook, were fakes. In the ensuing libel proceedings, the defendant sought to justify the allegation that the programmes were fakes and also to assert that the impugned words in their context were capable of meaning that a separate programme called 'The Connection', with which Mr Cook had no connection, was likewise faked. Eady J., in the High Court, found that the impugned allegations concerned Mr Cook's programme ('The Cook Report') and held that the defendant could not therefore make reference to "The Connection". On appeal, the decision of Eady J. in this regard was reversed. What makes the case of some interest in the context of the within proceedings is that the Court of Appeal was referred, inter alia, to two cases in which the courts had found that two separate libels had been contained in the same publication or series of publications but concluded that in the instant case the court was confronted with two separate allegations that were capable together of forming one single allegation which, subject to any considerations of case management, the appellants should be entitled to seek to justify. Per Latham LJ, at paras. 24–28:

> *"24. [We have been] referred to two cases in particular in which the courts have considered that two separate libels have been contained in the same publication or series of publications. The first is United States Tobacco International Inc v. British Broadcasting Corporation [1998] EMLR 816 which was referred to by the judge [i.e. Eady J.] in his judgment. This was a decision of this court [i.e. the Court of Appeal] in 1988. It related to the broadcast of a programme about a substance known as oral snuff which was considered by the government to present a danger to health. The programme asserted that the substance was carcinogenic and that the plaintiffs were in breach of an agreement that they had entered into with the Department of Health restricting the marketing of the product and forbidding its sale to young people. The plaintiff issued proceedings complaining of the allegation of a breach of the agreement. The defendants sought to plead and justify as part of the issues before the court the assertion that oral snuff presented a health risk. The plaintiffs were prepared to agree a statement which would go before the jury to the general effect that there was a significant body of medical opinion which considered the substance to be carcinogenic.*
>
> *25. Purchas LJ and Nicholls LJ held that although there was a connection between the two allegations, in that the reason for the agreement was the existence of what the Government perceived to be a health risk, nonetheless the defendant should not be permitted to plead and justify the health risk allegations. They both considered that a just determination of the dispute did not require a resolution of the health issue. Nicholls LJ said that its only relevance, in any event, was to damages. Russell LJ considered that they were in any event two separate and distinct allegations, and that therefore the defendant should not be permitted to raise the allegation about which no complaint had been made by the plaintiffs.*
>
> *26. The second case is Cruise v. Express Newspaper plc [1999] QB 931. The plaintiffs complained of an article which made serious allegations about their private life, and included defamatory comments about their adherence to the Church of Scientology. The defendants sought to justify the allegations relating to the Church of Scientology, even though those were no part of the plaintiffs' complaint. The judge struck out the defence in so far as it sought to justify the allegations in relating to the Church of Scientology. On appeal, this court upheld the judge. Brooke LJ, in his judgment with which the other members of the court agreed, concluded that the 'sting' about their characters of which they complained was totally distinct from the 'sting' that the article contained about their adherence to the Church of Scientology. Even though those allegations were clearly bound up in the other allegations, so that the whole of the article had to go before the jury, he concluded at page 955f:*
>
> *'The judge was in my judgment correct to hold that this libel action should not be permitted to get out of control by allowing the defendant to justify or plead fair comment in respect of a quite separate and distinct sting, if indeed it be a sting at all, of which the plaintiffs make no complaint.'*
>
> *27. Accordingly Mr Milmo submits that, in the present case, the parts of the articles which refer to 'The Connection', and its consequences for the respondents, constitute a separate and distinct 'sting' which should not be permitted to divert the court from consideration of the real issue, namely the question of whether or not the appellants can justify the allegations in relation to The Cook Report.*
>
> *28….Whether or not the appellants are wise to seek to expand the meaning of the articles in the way they do is a matter for them. But the meaning for which they contend seems to me to be one which is clearly capable of being understood by the ordinary reader. It follows that this is not a case where the defendants seek to assert and justify a separate sting; two separate allegations are capable together of forming one single allegation which, subject to any considerations of case management, the appellants should be entitled to seek to justify."*

93. Latham LJ indicated, at para. 44 of his judgment, that he saw in each of US Tobacco and Cruise "simply an application of the second *Polly Peck* principle". It will be recalled from the consideration of *Polly Peck* above that this second principle was identified by O'Connor LJ, at 1020-1 in the following terms: "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." Latham LJ continues, at paras 46–47:

> *"46. How then does the second Polly Peck principle apply to our case? The answer to my mind is plain. The defamatory allegations concerning respectively the Cook programmes and The Connection manifestly have a common sting. They are accordingly not to be regarded as separate and distinct. Why, then, should the appellants not rely on either to justify that common sting?*
>
> *47. As I understand Mr Milmo's argument, it is that a second allegation cannot properly be introduced for the purposes of justification under the common sting principles unless, taken together, the allegations can be said to advance a wholly general charge – in Khashoggi of promiscuity, here of fakery. That argument, to my mind, unnecessarily glosses the authorities and would too narrowly circumscribe the scope of the substantive defence of justification. It would, for example, prevent a defendant who alleged of a claimant that he had committed three murders, in the event that the claimant chose to sue only in respect of one, relying by way of justification on the other two. Mr Milmo would, I think, submit that nothing short of an allegation that the claimant is a serial killer could found a defence on this basis. I would reject the argument."*

94. This Court would respectfully agree with the assessment of Latham LJ that, in truth, all that was before the court in Carlton Communications was an application of the second *Polly Peck* principle. And insofar as Carlton Communications involved an application of that principle, the judgment of the Court of Appeal in that case is indicative of how Mr Ganley's application to strike out portions of RTÉ's defence ought now to be disposed.

i. *Desmond v. MGN*

[2009] 1 IR 737

95. Desmond is a libel action that arose out of a newspaper allegation that Mr Desmond, a prominent businessman, had made certain payments to former Taoiseach Charles J. Haughey. It is focused more on the mechanics of pleading justification than on issues of principle presenting. In the course of her judgment, Macken J., in the Supreme Court, noted that it appeared that the defendant was raising a plea of alternative justification, then continued, at 764:

> *"A plea of justification is particularly important, having regard to the nature of the obligations imposed in that regard, for the law makes it very clear, as Kelly J. stated in Cooper Flynn…citing Lord Denning MR in Assoc. Leisure v. Assoc. Newspapers [1970] 2 QB 450 at p.456:-*
>
> > 'Like a charge of fraud he (counsel) must not put a plea of justification on the record unless he has clear and sufficient evidence to support it.'
>
> *I am satisfied that counsel would not put a plea of justification other than in accordance with their obligations in that regard, since the case-law also makes it clear that a plea of justification, simpliciter, is a mere repetition of libel, and ordinarily, material facts supporting a plea of justification should be included in the defence as delivered (McDonagh v. Sunday Newspapers Ltd [2005] IEHC 183….*
>
> *Even allowing for a modified form of justification which counsel for the defendant now appears to contend for, it is axiomatic that there is an obligation on a party pleading justification to remain at all times in possession of all the evidence, including notes which go to support the plea, as well as all the meanings contended for, at the time of the delivery of the defence. A failure to do so in my view may well constitute, depending on the circumstances, negligence, even gross negligence on the part of the party invoking such a plea who fails to ensure that the evidence is in fact maintained, at least to the expiry of a limitation period."*

96. Subject to and notwithstanding the foregoing, there is no departure in Desmond from the fundamental principles, now considered by the court at some length, as to the pleading by a defendant of the truth of one or more alternative meanings of an impugned publication to that or those claimed by the plaintiff. Moreover, as the court noted when considering Cooper Flynn above, the decision in Desmond, though it enjoys the natural respect which all utterances at Supreme Court level enjoy, does not really advance the resolution of the application now before the court as the court understands there to no suggestion of any impropriety on the part of counsel for RTÉ as regards the plea of justification made by and for their client.

j. Bradley v. Independent Star Newspapers Limited

[2011] IESC 17.

97. These were defamation proceedings in which the defendant newspaper company entered a defence which, in effect, asserted that an impugned newspaper article bore the meaning alleged by the defendant, not the meaning alleged by the plaintiffs, and that the meaning which the defendant stated the article to bear was true both in substance and in fact. More particularly, the plaintiffs pleaded that an article published by the defendant meant that they were guilty of armed robbery; the defendant sought, by reference to the text of the impugned article, to defend merely the proposition that the plaintiffs were suspected by An Garda Síochána of committing serious crimes. Commenting in this regard, Hardiman J., observed as follows, at pp. 10–12 of his judgment:

> *"It was…denied that the article bore the meanings alleged in the statement of claim or any meaning defamatory of the plaintiff. There was then a pleading that if the respective plaintiffs were identified by the publication then 'the same are true in substance and in fact in their true meaning, but not in the meanings pleaded in the statement of claim'.*
>
> *This is a most unusual pleading. The learned trial judge subsequently held, correctly in my view that it did not constitute a recognisable plea of justification….*
>
> *[*Following legal argument concerning this aspect of matters*] the trial judge gave a ruling in the following terms:-*
>
> > 'In practical terms, and I think this key, I don't think that the defendants in this particular case can advance these matters by way of suggesting that the article complained of is true in substance and in fact. I don't see how even if they succeed in proving the various matters, for example that they are suspected of crime, that they are thought to be involved in particular matters that have been set out, that that will result in a successful plea of justification…I don't think that they [the defence] are entitled to advance a plea which falls so short of justification in the context of what is the meaning of the article as a whole in terms of where it stands. So far as that is concerned, it is out.'"

98. The particular difficulty that presented in Bradley was that the defendant in that case pleaded a meaning which the impugned article was simply incapable of bearing. In the within case RTÉ pleads alternative meanings which the impugned broadcast, it seems to the court, is at least capable of bearing. Which, if either, of RTÉ of Mr Ganley is correct as to the proper understanding of the impugned broadcast is not a matter for this Court to decide and on which it expresses no view. All it would note in the context of the within application is that what RTÉ seeks to do here is radically different to what the defendant in Bradley was seeking to do. The manner in which RTÉ has approached matters in this regard accords entirely with the longstanding proposition succinctly stated by Gatley, *op.cit*. that "*Where a claimant complains that words are defamatory of him in their natural and ordinary meaning, the defendant is entitled to justify those words in any meaning which those words are capable of conveying to a reasonable man*". *Bradley* cannot be relied upon as involving a disavowal of this principle for the simple reason that there is no such disavowal contained therein or identifiable therefrom.

(iv) A Distillation of Principle.

99. Is it possible to distil some key principles from the foregoing analysis of case-law that are of assistance in resolving the application now before the court to strike out segments of RTÉ's defence? It seems to the court that the following key principles can be identified:

A. General.

[1] Where a claimant complains that words are defamatory of him in their natural and ordinary meaning, the defendant is entitled to justify those words in any meaning which those words are capable of conveying to a reasonable man. (*Prager*).

B. Plaintiff's Pleadings Not Determinative.

[2] The scope of the defence of justification does not depend upon the way the plaintiff pleads his case, but on the meanings which the words published are capable of bearing. (*Prager*).

C. Common Sting.

[3] A defendant is entitled to justify a common sting derived from parts of a publication, taken as a whole, of which the claimant does not complain, insofar as they are relevant to the meaning of the words complained of and to the sting of the alleged libel. The claimant is not entitled to use a blue pencil on the words published of him so as to change their meaning and then prevent the defendant from justifying the words in their unexpurgated form. (Warren, Khashoggi).

D. *Polly Peck*.

[4] The four *Polly Peck* principles apply as a matter of Irish law, viz:

(1) where a plaintiff chooses to complain of part of a whole publication, the jury is entitled to see and read the whole publication. (The jury can use the whole publication to provide the context to the words complained of when considering whether any, and if so what, defamatory meaning is disclosed. What other use can be made depends on the nature of the material and on the defences put forward by the defendant);

(2) 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 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);

(3) 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);

(4) the trial of the action should concern itself with the essential issues and the evidence relevant thereto; 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.

E. Separate and Distinct.

[5] Whether a defamatory statement is separate and distinct is a question of fact and degree in each case. The action should concern itself with the essential issues necessary for a fair determination of the dispute between the parties. (Warren).

[6] Two separate allegations are capable together of forming one single allegation which, subject to any considerations of case management, the appellants should be entitled to seek to justify. (Carlton Communications).

[7] It is not the case that a second allegation cannot properly be introduced for the purposes of justification under the common sting principles unless, taken together, the allegations can be said to advance a wholly general charge (in *Khashoggi* of promiscuity, in *Carlton Commnunications* of fakery). That would too narrowly circumscribe the scope of the substantive defence of justification. It would, for example, prevent a defendant who alleged of a claimant that he had committed three murders, in the event that the claimant chose to sue only in respect of one, relying by way of justification on the other two. (Carlton Communications).

F. Function and Form of Pleadings.

[8] The function of pleadings, including defamation proceedings, is to define the issues between the parties, so that both the plaintiff and the defendant knows what is the other side's case and thus everyone, counsel, judge and jury, are able to focus upon the real nature of the dispute. (Lucas-Box).

[9] A defendant who is relying upon a plea of justification must make it clear to the plaintiff what is the case which

he is seeking to set up. The particulars themselves may make this quite clear, but if they are ambiguous then the situation must be made unequivocal. (Lucas-Box).

[10] The defence is not entitled to advance a plea which falls so short of justification in the context of what is the meaning of the article as a whole in terms of where it stands. (Bradley). (It will be recalled that the particular difficulty that presented in Bradley was that the defendant in that case pleaded a meaning which the impugned article was simply incapable of bearing).

G. Constrained Role of Court.

[11] The bar for judicial intervention is set relatively high. (In Hamilton, Eady J. considered that he should intervene only when a meaning contended for was so implausible that it held the potential for a perverse outcome. Walsh J. in Quigley said a 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". In Berezevsky, the court's role was characterised by Sedley L.J. as "an exercise in generosity not in parsimony….[O]nce fairly performed, it will not be second guessed on appeal…the long stop is the jury.")

[12] A court should not step in to defend a cause of action in defamation if it considers that what is before it is a case in which the plea of justification might, not would, succeed. (*Khashoggi*).

H. Mechanics of Pleading.

[13] Like a charge of fraud, counsel must not put a plea of justification on the record unless s/he has clear and sufficient evidence to support it. (Assoc Leisure, Cooper Flynn, Desmond).

[14] It is axiomatic that there is an obligation on a party pleading justification to remain at all times in possession of all the evidence, including notes which go to support the plea, as well as all the meanings contended for, at the time of the delivery of the defence. (Desmond).

(v) A Three-Fold Test.

100. Following on the foregoing, what key questions might a court usefully ask of itself when presented with a justification plea by reference to an alternative meaning and, as here, an associated application to strike out parts of the defence? It seems to the court that three such questions might usefully be asked. First, is the alternative meaning contended for by the defence capable of arising from the publication? If the meaning is entirely incapable of arising, then the meaning cannot be argued by the defence. Second, does the defence meaning arise from a separate and distinct allegation in the impugned publication about which the plaintiff does not complain? If it does, the defence meaning cannot be argued. So, for example, an allegation about a speeding offence cannot be answered by proving the truth of a separate and distinct allegation concerning murder. However, great care is required in this regard in order to ensure that a plaintiff is not allowed to sue on snippets that distort the true meaning that an impugned publication can reasonably be argued to bear. Third, are proper particulars of fact provided that are capable of supporting the defence? If there are no particulars capable of establishing the alternative meaning, then that meaning cannot be argued by the defence. The answers to the three questions just posed must respectively be 'yes', 'no' and 'yes' if the pleaded alternative meaning is to be allowed by the court to be aired at trial.

101. A possible fourth question, aimed primarily at maximising the efficient despatch of proceedings, might be whether the alternative meaning is not substantially different from and not more injurious than the plaintiff's contended meaning. The critical, and not sole, difficulty with this fourth question, and which inclines the court to the view that it is not appropriate that such question be asked, is that it could see a defendant, for reasons of efficiency, suffering the injustice of being prevented from arguing a defence which might have succeeded before a jury, and ultimately the doing of justice, not the relentless pursuit of efficiency, must be the pole-star by which the courts navigate through proceedings.

102. In the context of the within proceedings, the answers reached by the court, by reference to the facts before it, to the three questions posed are respectively 'yes', 'no' and 'yes'.

(vi) Application of Principle.

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

VII. Conclusion

104. The court returns to the various reliefs sought by the parties at this time and indicates the orders that it is satisfied to make, following on its analysis of matters in the preceding pages.

(i) Mr Ganley's Strike-Out Application #1.

105. By notice of motion of 30th April, 2015, Mr Ganley seeks an order striking out RTÉ's defence for failure to comply with the High Court Order for discovery made on 4th February, 2015. The court declines to accede to this application. However, the court will order

that RTÉ comply forthwith with the said High Court order. In doing so, the court is alive to RTÉ's contention that for it to make discovery in accordance with the said order at this time may disadvantage it in terms of any cross-examination of Mr Ganley on his affidavits of discovery sworn hitherto. But discovery invariably brings with it the risk that the party making discovery may suffer some disadvantage thereby and RTÉ has in truth done no more than voice a generalised concern of possible disadvantage should it comply with the order of 4th February, 2015. The court notes too that it does not seem to it that the deficiencies in Mr Ganley's discovery thus far, and there have been deficiencies, justify the court in seeking to fashion some form of ad hoc process that departs greatly from the typical discovery régime. If anything, it seems to the court that its role, when there are demonstrable departures by a party from its discovery obligations, ought, at least in the first instance, to be to seek to remediate matters so as to restore the carefully calibrated equilibrium of the existing discovery regime, rather than accede to further departures from same.

(ii) RTE's Discovery and Cross-Examination Application.

106. By notice of motion of 7th May, 2015, RTÉ seeks a variety of orders, including:

> (i) an order permitting RTÉ to file in court the Affidavit of Discovery sworn by Ms Katie Hannon for RTÉ, with the schedules to the said affidavit to be sealed until further directions or orders are made by the court as to the release of the schedules to Mr Ganley or otherwise,
>
> (ii) an order for further and better discovery (coupled with an order directing Mr Ganley to identify such relevant and necessary documents as were in his possession and power along with an explanation as to when he parted with them and what has happened to them),
>
> (iii) an order granting RTÉ leave to cross-examine Mr Ganley in respect of all issues arising from the Affidavits of Discovery sworn on 10th April, 2015, and 27th August, 2014, and
>
> (iv) an order dismissing Mr Ganley's claim for want of prosecution and/or failure to make proper discovery.

107. As to (i), the court declines to grant this relief, not least though not only because it seems to the court that its role, when there are demonstrable departures by a party from its discovery obligations, ought generally to be to seek to remediate matters so as to restore the carefully calibrated equilibrium of the existing discovery regime, rather than accede to further departures from same.

108. As to (ii), in the hope that it may yet reduce the amount of cross-examination that is required and because it is preferable in any event that discovery should proceed as it generally does to the greatest extent possible, the court will make such order.

109. As to (iii), given the deficiencies that appear from the factual evidence before the court to exist in Mr Ganley's discovery thus far, and mindful that discovery is not an exercise in perfection (though conscious that it is not perfection but mere compliance with standard discovery obligations that is being sought in the within instance) the court will make such order.

110. As to (iv), notwithstanding the deficiencies that appear to present in Mr Ganley's discovery to this time, given the reliefs to be granted under items (ii) and (iii), the court declines to grant at this time the order sought at (iv).

(iii) Mr Ganley's Strike-Out Application #2.

111. By notice of motion of 18th March, 2016, Mr Ganley seeks an order pursuant to O.19, r.27 of the Rules of the Superior Courts, as amended, striking out paras. 8–10 of RTÉ's Defence delivered on 15th November, 2012.

112. For the reasons stated previously above, the court declines to accede to this application.

(iv) Pace of Proceedings.

113. It is, to put matters at their very mildest, undesirable that a claim of defamation arising from a broadcast in November, 2008 should not yet have proceeded to trial and been decided upon over eight years later. It is not fair on a person who considers himself to have been defamed that his name should, if he is correct in his contentions, stand tarnished without appropriate relief being granted for the better part of a decade. It is not fair on the relevant journalists, if they did nothing wrong, that they should remain mired in defamation proceedings for such a protracted period. And there have to be and are concerns as to the chilling effect for free speech, a right of the most profound significance, if defamation proceedings are generally to become enormously lengthy and hence enormously costly affairs. In a bid to accelerate the present course of these proceedings, the court would therefore propose to set aside a day later in the present term for the cross-examination of Mr Ganley.