THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 380

Record Number: 2017 28

Peart J.
Whelan J.
McGovern J.

BETWEEN/

SUSAN STEIN

PLAINTIFF/

RESPONDENT

V

DANA ROSEMARY SCALLON

FIRST DEFENDANT/

APPELLANT

AND

TV3 TELEVISION NETWORK LIMITED

SECOND DEFENDANT

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JUDGMENT of Ms. Justice Máire Whelan delivered on the 30th day of November 2018

Introduction

1. The respondents are mother and daughter. Susan Stein and Dana Rosemary Scallon are sisters. The parties are accordingly closely related. As with all familial conflict, virtually all of the salient facts in the case are strenuously contested. The litigation before the Court stems from a statement made by the appellant on 14th October 2011 in an interview with the second named defendant TV3 Television Network Limited. Arising from that interview, on 1st December 2011, the respondents each instituted High Court proceedings seeking damages for alleged defamation including punitive and aggravated damages and sundry reliefs pursuant to the provisions of the Defamation Act 2009 together with interest pursuant to statute and costs.

2. This is an appeal by the first named defendant ("the appellant") from the refusal of the High Court to grant security for costs. Eagar J. refused to make an order directing that each of the respondents furnish security for the costs of the respective proceedings together with consequential orders as sought in a notice of motion issued on 13th November 2013. The High Court judge delivered his judgment on 30th November 2016. It sets out in detail the litigation history between the parties insofar as germane to the application.

3. On 4th May 2012 a statement of claim was delivered. On 25th May 2012 the appellant's solicitors wrote seeking information regarding assets of the respondents within the jurisdiction. Both respondents are ordinarily resident in the State of Iowa, USA. On 1st June 2012 a letter on behalf of the respondents asserted that the request regarding information on assets within the jurisdiction was premature. In the course of the following year there was further progress with the litigation including the delivery of notice for particulars and a court application on behalf of the appellant to compel replies to a notice for particulars which was ultimately complied with in February 2013. On 10th July 2013 a defence was delivered on behalf of the appellant. On the same date a formal request for security for costs pursuant to Order 29 of the Rules of the Superior Courts was directed to each of the respondents. Following a reminder, a motion for security for costs issued on behalf of the appellant in respect of both respondents on 13th November 2013.

Arguments before the High Court
4. Both motions were heard together. The appellant relied on the provisions of the defences as delivered which included inter alia:

(a) a plea of truth and reliance on s. 16 of the Defamation Act 2009;

(b) a plea of honest opinion and reliance on s. 20 of the said Act;

(c) a denial that either plaintiff was identified;

(d) a denial that either plaintiff had a sufficient reputation in Ireland to bring the proceedings;

(e) the meaning of the words as contended for by the plaintiffs was denied.

5. It appears that at the lengthy hearing of the interlocutory motion, which took three days and resulted in a reserved judgment, there was broad agreement between the parties with regard to the relevant legal principles governing an application for security for costs.

6. It was contended on behalf of the appellant that, *inter alia*, there was full compliance with the provisions of Order 29, r.1 of the Rules of the Superior Courts. Delays were attributed to the respondents. It was asserted that the appellant had a *prima facie* defence upon the merits to the matters claimed in the statement of claim. The particulars and details of that defence were set out.

7. A key contention on behalf of the appellant was that the respondents had failed to establish that they had an inability to provide security for costs and had failed to provide any documentation to support their bare assertions in this regard. It was asserted that the respondents had been vague and not forthcoming about their true financial circumstances.

8. In support of the latter contention, it was argued by counsel for the appellant that a compromise and financial settlement had been concluded between the respondents and TV3 but that neither respondent had disclosed, even in broad terms, what monetary sums they had received under the settlement. The appellant also argued before the High Court that a contention on behalf of the respondents that the litigation was "in the public interest" was misguided. The respondents had each offered an after the event insurance policy (ATE insurance) and contended that same was of "transcending importance" to the security for costs application. The appellant contested this, asserting that the significant degree of conditionality attached to the operation of the policies resulted in them failing to provide sufficient security to the appellant to warrant a refusal of an order for security of costs. It was further argued that the structure of the policies amounted to *champerty*, and accordingly that as a matter of public policy the ATE insurance policies being tendered should not be accepted by the court.

9. On behalf of the respondents it was contended before the High Court that the motion pursuant to Order 29 amounted to a tactical manoeuvre designed to stifle a legitimate claim. It was argued that the application took advantage of the residency of the respondents outside of the EU and their lack of resources. It was emphasised that both respondents had secured after the event insurance which "not only demonstrates their own belief in the legitimacy of their cause it removes any possible prejudice which Ms Scallon might suffer should she ultimately win this case. In truth, the presence of this insurance policy should bring this application to an end."

10. It was argued that a notable feature of the proceedings was that TV3 had apologised to the respondents for the alleged defamation caused from the same interview and had paid "a sum in compensation."

11. In detailed submissions filed on behalf of both respondents in the High Court it was contended that no convincing defence had been articulated by the appellant to the claims of the respondents. Each of the grounds of defence advanced on behalf of the appellant were analysed in light of the relevant jurisprudence, it being contended that no *bona fide* defence was made out. It was contended that delays on the part of the appellant were a material factor which the court should take into account and went towards refusing the relief being sought.

12. There was a significant disparity between the parties in the High Court as to the projected likely cost of proceedings should they proceed to a hearing. On behalf of the appellant it was contended that €450,000 in respect of security between both sets of proceedings was required. The respondents in a written report from Flynn & O'Donnell dated 26th June 2014 suggested that the total costs would amount to approximately €189,000.

13. It was contended on behalf of the respondents, arising in part from the appellants' reliance on s. 20 of the Defamation Act 2009 in her defence, that the words used by the appellant and which are the subject matter of the defamation suits involve matters of public interest. It was argued that if the court was of the view that this plea amounted to a *prima facie* defence then it was one which warranted the exercise of the court's discretion to refuse security for costs.

Judgment of the trial judge
14. The judgment was delivered on 30th November 2016. The judge sets out in detail the provisions of Order 29 of the Rules of the Superior Courts which governs interlocutory applications for security for costs. He considered the statements of claim of the respondents and the words relied upon as being defamatory and same are set out *in extenso.*

15. The trial judge considered the factual matrix that obtained at the time of the broadcast on 14th October 2011, a time when the appellant was a candidate in the presidential election campaign then underway. The trial judge noted that the subject matter of the interview concerned what the appellant alleged to be false allegations of a sexual nature which had been circulated pertaining to a close relative of the parties. The trial judge noted the conduct of the appellant throughout the TV3 interview and that the appellant "knew" that it was public knowledge that the "plaintiffs were involved in a court case with the defendant and her brother… in and around the same time" and at one stage in the interview had apparently stated "much of the detail of the court case is now on social websites and a lot of people will know what we are talking about." (para. 6 of the judgment)

16. The trial judge set out in detail the legal principles governing an interlocutory application for security for costs where a plaintiff is resident outside of the EU. He referred to the judgment of Morris P. in *Inter Finance Group v. KPMG, Peat Marwick* [1998] IEHC 217, which was followed by Clarke J. (as he then was) in *Connaughton Road Construction Limited v. Laing O'Rourke Ireland Limited* [2009] IEHC 7 which stated the applicable test as follows:

> "(1) In order to succeed in obtaining security for costs an initial onus rests upon the moving party to establish:
> (a) that he has a *prima facie* defence to the plaintiff's claim, and
>
> (b) that the plaintiff will not be able to pay the moving party's costs if the moving party be successful.
>
> (2) In the event that the above two facts are established, then security ought to be required unless it can be shown that there are specific circumstances in the case with ought to cause the court to exercise its discretion not the make the order sought.
>
> In this regard the onus rests upon the party resisting the order. The most common examples of such special circumstances include cases where a plaintiff's liability to discharge the defendant's costs of successfully defending the action concerned flow from the wrong allegedly committed by the moving party or where there has been delay by the moving party in seeking the order sought.
>
> The list of special circumstances referred to is not of course, exhaustive.
>
> In this regard the onus rests upon the party resisting the order. The most common examples of such special circumstances include cases where a particular plaintiff's liability to discharge the defendant's costs of successfully defending the action concerned flow from the wrong allegedly committed by the moving party or where there has been delay by the moving party in seeking the order sought. The list of special circumstances referred to is not…. exhaustive."

17. The trial judge expressed the view that the court ought not to embark upon a substantive assessment of the merits of the plaintiffs' or defendants' case and he cited the judgment of Charleton J. in *Oltech (Systems) Limited v. Olivetti UK Limited* [2012] IEHC 512 in support of that proposition. The court noted that the onus of proof lies on the moving party for the first two limbs of the *Connaughton Road* test stating "… if these are established by the moving party, the onus should then shift onto the plaintiff to prove the existence of a special circumstance that ought cause the Court to exercise discretion in their favour." (para. 9)

18. The trial judge then considered whether a *prima facie* defence had been established, again considering the extensive jurisprudence of the courts in that regard. In this context he stated at para. 13 of the judgment:

> "The case, if it is to proceed, is a defamation case which will largely turn on the jury's assessment of the adequacy of the defence as set out by the defendant… It is not the function of the Court to assess whether the defence contended for is likely to succeed at full hearing, or even has a good prospect of succeeding. This Court, having regard to the affidavit sworn by the defendant setting out the defence, finds that the hurdle of establishing a *prima facie* defence has been met. Admissible evidence and arguable submissions have been furnished by the defendant."

19. The judge then turned to a consideration of the plaintiffs' financial position. He noted that "the defendant seeks security for €450,000 whereas the plaintiffs estimate the costs amounting to €189,000." (para. 14)

20. With regard to the issue of impecuniosity, the trial judge noted at para. 15 that:

> "Counsel for the plaintiffs … suggest that if this security for costs is granted by the Court, this would bring the plaintiffs' claim to an end. This may well be the case, but it does and should not influence the Court in any way."

He then turned to an evaluation of the two ATE insurance policies which had been taken out by the plaintiffs. He considered the specific terms of same, the exclusion provisions and the capacity of the insurer to engage with or control the proceedings. He noted at para. 19 of the judgment that the policy is designed for the jurisdiction of England and Wales and further that the governing law referred to in the policies were those of England and Wales.

21. The trial judge went on to state at para. 22 that the policy "does not amount to a de facto proof that the plaintiffs will be able to discharge the defendant's costs" and that; "On the basis of the information put before the Court, this Court finds that the plaintiffs' policy does not justify an exercise of discretion in favour of refusing the present application." At para. 25 the trial judge concluded that the court would exercise its discretion "in finding that the plaintiffs' disputed impecuniosity is not a reason to grant the present application."

22. The trial judge then turned to a consideration as to whether special circumstances had been established which justified the exercise of discretion to refuse security for costs. This represents the third limb of the *Connaughton Road* test. In analysing the special circumstances justifying a refusal for security for costs, the trial judge observed at para. 29:

> "There is often a conflation in the case law of the terms "public interest", "public value", "national importance" and "public importance"."

He noted the observations of Barrett J. in *Dublin Waterworld Limited v. National Sports Campus Development Authority* [2014] IEHC 518. He also noted Charleton J.'s observations in Oltech that a special factor disentitling a defendant to an order for security for costs is that a point of law for decision in the case may be so important that the process of the case should not be interrupted. In *Oltech* Charleton J. stated at para. 22:

> "A point of fact of national importance can arise in litigation that is inescapably central to a case and which will settle a

> concern of great public moment. Such an issue will arise rarely. Litigation between private entities is by nature compensatory or restoratory. It is only in the most extreme circumstances that any fact in contention between litigants can keenly affect the public interest. Where that occurs, this can be a special factor in refusing to order security for costs."

23. Eagar J. considered that the comments made by the appellant during her presidential election campaign "were and are a matter of public interest". He went on to state at para. 34:

> "The Court further considers that the nature [this Court's emphasis] of the comments made by the defendant ought be scrutinised, in order to determine whether or not a special circumstance exists in the present case, that ought cause this Court to exercise its discretion not to grant security for costs."

The trial judge reviewed a substantial portion of the interview. He noted that the appellant's assertion of truth concerned allegations circulating about a relative of the parties whom the respondent, Ms. Gorrell, alleged had abused her. He noted that subsequent to the interview, the individual against whom the allegations of sexual abuse had been made was tried and acquitted of all charges in England.

24. The trial judge considered in particular a decision of the Supreme Court in *S.H. v. The DPP* [2006] IESC 55, [2006] 3 I.R. 575 where the views of Prof. Harry Ferguson, an expert in the social history of child welfare, embodied in his affidavit sworn in *S.H.*, were considered by the Supreme Court. That extract appears, in part, to have encompassed an expert opinion on the history of child sexual abuse and child protection in Ireland with particular emphasis on the situation that pertained in the late 1960's and the perceived legitimacy of any allegations of sexual abuse made by parents or children and responses to them at that time.

25. Based on an excerpt from Prof. Harry Ferguson's said affidavit in *S.H.*, the trial judge noted at para. 40 of his judgment:

> "Having regard to the affidavit evidence of Professor Harry Ferguson, where a complainant delays in bringing allegations of sexual abuse, this does not mean that the complaint is false. The way in which many complaints of sexual abuse have come to light in this jurisdiction has reflected that the opposite is true, that victims of sexual abuse often delay in bringing complaints – prior to the 1990's, sexual abuse was lacking an "official reality" in this country. This contention squarely contradicts the comments made by the defendant in the currency of the presidential campaign. This Court does not wish to traverse into the merits of the plaintiffs' claim, namely whether the allegations made by the defendant were false and defamatory or not. However, this Court finds that there is a *public value* [this Court's emphasis] in litigating claims involving allegations of sexual abuse in a civil context, where the onus of proof, beyond reasonable doubt, was not established in a criminal trial."

26. Having cited authorities where a public value and public interest was considered in the context of security for costs applications the judge concluded; "In all the circumstances of the case, the court will refuse to direct that the plaintiffs furnish security for costs of these proceedings." (para. 43)

The notice of appeal

27. In a notice of expedited appeal filed on 26th January 2017 the appellant raised 13 separate grounds including the following:

> (i) That the trial judge erred in finding that the plaintiff had identified special circumstances sufficient to justify a refusal to grant security for costs.
>
> (ii) The High Court ought to have found that the plaintiff's assertions of impecuniosity were not credible.
>
> (iii) The judge erred in referring to and in placing reliance upon an affidavit of Professor Harry Ferguson referred to in a decision of the Supreme Court in *S.H. v. The DPP* [2006] 3 I.R. 575.
>
> (iv) The trial judge erred in placing reliance on reported extracts from an affidavit that was not before the court.
>
> (v) The trial judge erred in finding that there is "public value" in litigating the claim.
>
> (vi) The trial judge erred in finding that "there is a public value in litigating claims involving allegations of sexual abuse in a civil context" and in applying that principle to these proceedings where a person alleged to have abused the respondent, Susan Gorell, is not a party to either proceedings and has not been sued in civil proceedings by the respondents and has in fact been acquitted of the charges by a jury following a criminal prosecution.
>
> (vii) The trial judge erred in scrutinising the nature of the appellant's comments and considering whether they were "true or not" in order to determine whether or not a special circumstance existed to decline to order security for costs.
>
> (viii) The trial judge erred in taking an excessively broad and permissive approach to the exception where security for costs should not be directed where proceedings raise a point of exceptional public importance.
>
> (ix) The High Court, having found that the defendant had established a prima facie defence failed to properly place the burden of proving the impecuniosity on the plaintiffs. The judge, having found that he was undecided as to their impecuniosity, erred in failing to direct that the plaintiffs should furnish security for costs of these proceedings to the defendant.
>
> (x) The High Court erred as a matter of law in venturing into the merits of the proceedings by assessing the nature of the comments made by the first defendant and whether or not the comments were true and consistent with the first named defendant's defence of truth.
>
> (xi) The High Court conflated the claims of the plaintiffs with criminal proceedings which were brought and subsequently concluded in the United Kingdom and which have no connection with or relevance to the proceedings.
>
> (xii) The judge erred in finding that the appellant's comments are still a matter of public interest when the political campaign referred to is long over and is not a matter of public interest or concern.
>
> (xiii) The judge erred in deciding the issue of public interest by making reference to and linking those criminal proceedings

to the within proceedings. The High Court failed to take proper account of the fact that the within proceedings relate to a claim for defamation and are not a civil claim for alleged sexual abuse.

Arguments of appellant

28. The appellant's arguments regarding grounds (v), (viii), (ix), (xii) and (xiii) of the notice of appeal are essentially that the judge in his decision clearly acknowledges that the respondents undertake a heavy burden in seeking to rely on the issue of public importance in order to establish an exception that would deny the appellant an entitlement to an order for security for costs. It is argued that the High Court accepted that for an issue to be considered one of national importance, it must be capable of settling "… a concern of great public moment." It was contended that this was evident from the judgment, particularly insofar as the judge relied on the decision of Charleton J. in *Oltech (Systems) Limited v. Olivetti UK Limited*.

29. The appellant also cited the decision of *Lancefort Limited v. An Bord Pleanála* [1998] 2 I.R. 511 where Morris J., at p. 516, had held that for an issue to be one of exceptional public interest it must be "of such gravity and importance that it transcends the interests and considerations of the parties actually before the court." Reliance was placed on the line of authorities which subsequently followed the *Lancefort* decision including Laffoy J. in *Village Residents Association Limited v. An Bord Pleanála (No. 2)* [2000] 4 I.R. 321 who cited *Lancefort* with approval.

30. It was argued on behalf of the appellant that the judge had erred in finding that the issues in dispute raised any "point of law" of any particular significance much less one of exceptional public importance. It was contended that the judge had conflated the respondents' claims for defamation against the appellant on the one hand with criminal proceedings which were brought against another family member in the United Kingdom and which have no connection with the defamation proceedings under consideration. It was submitted that the judge's view with regard to a public interest in these defamation proceedings was erroneous insofar as the alleged defamation occurred during a political campaign which was long over and the matters at issue were not of any public interest or concern. Further, it was contended that in his observations the trial judge failed to take proper account of the fact that the proceedings relate to a claim for alleged defamation only and do not constitute a civil claim for damages for alleged sexual abuse. Thus, it was argued that the proceedings do not involve issues of such gravity and importance as would transcend the interests of the parties, nor do they involve any issue of law that needs to be clarified for future cases.

31. With regard to grounds (iv), (vi), (vii) and (x) of the notice of appeal, the appellant advanced arguments regarding same with particular reference to the consideration by the trial judge in his judgment of the decision of the Supreme Court in *S.H. v. The DPP*. It was submitted that whilst the judge during the hearing of the motion invited both parties to address the court in relation to that decision it was an authority that had not been relied upon by either of the parties in written legal submissions or in oral argument made in the High Court.

32. In the course of his judgment the judge stated that he had had "regard to the affidavit evidence of Professor Harry Ferguson" and had concluded that the contents of the affidavit in question supported a contention that "squarely contradicted" the comments which had been made by the appellant in the course of the presidential campaign and which were the subject matter of the defamation claims. In reaching this conclusion it was contended that the judge had erroneously made a finding of fact based on part of an affidavit which was not before the High Court. It was asserted that the judge had taken judicial notice of a matter which he was not entitled to consider in reaching his decision since the contents of the affidavit in question are not a matter of common knowledge and everyday life nor are they matters of which the judge is required by law to take judicial notice. It was argued that the High Court erred in taking into account part of the contents of the affidavit without requiring formal proof of its contents.

33. With regard to grounds (i), (ii) and (ix) of the notice of appeal, which pertained to special circumstances and the issue of impecuniosity, the appellant refers to para. 43 of the judgment wherein the judge stated:

> "The Court is undecided as to the impecuniosity of the plaintiffs but notes the indication of their counsel that the case will not proceed in the event that an order for security for costs is made by this Court. The Court does not determine the issue on the basis of this statement."

34. The appellant placed reliance on the decision of the High Court of Finlay P. in *Collins v. Doyle* [1982] I.L.R.M. 495 wherein it was stated:

> "In general it would appear to me that the principle underlying a defendant's right to security for costs must be that he should not suffer from an inability to recover the cost of successfully defending the claim arising from the fact that the unsuccessful plaintiff resides and has his assets outside the jurisdiction of the court."

35. The appellant argues that whilst the courts have found that the mere fact of impecuniosity is not sufficient to warrant the granting of an order for security for costs, this issue is grounded in a concern to protect a plaintiff against the use of security for costs to obstruct a claim. This is particularly relevant where a plaintiff's impecuniosity has been caused by the defendant. It was argued that in the instant case none of these factors apply. It has not been contended by the respondents or either of them that the appellant caused their claimed impecuniosity. It was contended that it is also material that the judge found as a fact that neither of the respondents had established that they were impecunious.

36. A further argument was advanced that the respondents had both reached a settlement of their claims with the second named defendant, TV3, and despite having an opportunity to do so, had failed to disclose the amount of the said respective settlements. It was contended that once the judge had found that the appellant had established a *prima facie* defence and further that he was undecided as to the impecuniosity of each of the respondents he should have, in accordance with the dicta of Finlay P. in the decision of *Collins v. Doyle* aforesaid, directed the respondents to furnish security for costs of the proceedings to the appellant.

Position of respondents

37. On behalf of the respondents it was argued that the jurisprudence points to a wide discretion which must take into account a range of considerations ultimately designed to achieve what is just in the circumstances. Reliance was placed on the Supreme Court decision in *Malone v. Brown Thomas & Co. Limited* [1995] 1 I.L.R.M. 369 as authority for the following propositions:

> (1) The ordering of security for costs is a matter for the discretion of the court.
>
> (2) That in the exercise of its discretion, the court must consider all the circumstances of the case.

(3) That neither mere residence outside the jurisdiction nor the poverty of the respondent is a sufficient justification for compelling an appellant to lodge security for costs.

(4) The onus is on the applicant to establish reasonable grounds for his entitlement to the order.

38. The respondents placed reliance on the determination of the judge at para. 25 of his judgment where it was stated that:

> "the plaintiffs are seeking to bring a genuine claim where they allege very serious matters"

and that this had not been challenged in the appeal.

39. It was contended that the alleged defamation as pleaded gave rise to issues of public importance and that there was a public value in litigating same since the words were uttered by the appellant in the course of her presidential campaign. It was argued that the nature of the utterances characterised sexual abuse claims as being false by reason that the victim had delayed in making a complaint. It was contended as germane that the appellant has pleaded justification in her defence on the basis that the respondent, Ms. Gorrell, delayed in making her complaint. Accordingly, it was argued that the appellant has grounded her plea of justification in regard to the alleged defamation upon delay.

40. It was argued that the apology and payment of compensation on the part of the second named defendant, TV3, "… is also evidence that the plaintiff's case has substance herein." It was argued that the appellant is seeking to run a defence of justification on the basis of a plea that a delayed complaint concerning sexual abuse cannot be true.

41. Emphasis was placed on excerpts from an affidavit of Professor Ferguson considered in S.H., already referred to, and to the judge's observations in his judgment at para. 40 to which I have already referred at para. 25 above.

42. The respondents contend that the judge in the High Court did not take into account the evidence of Professor Ferguson but rather took into account the Supreme Court decision in *S.H. v. The DPP*.

43. Reference was made in particular to the decision of Murray C.J. at p. 618 of the judgment wherein he states:

> "The views of Professor Ferguson above correlate with the experience of the court. Moreover, the court's experience extends to a broader set of issues and it has found that there is a range of circumstances extending beyond dominion or psychological consequences flowing directly from the abuse which militate or inhibit victims from bringing complaints of sexual abuse to the notice of other persons, in particular those outside their family and even more particularly the gardaí with a view to a possible trial."

44. The respondents contend in their submissions that the judge was correct in noting that there is a public value in resolving the assertions made by the appellant. It was argued that the appellant was making a public pronouncement that victims of sexual abuse who delay in making their complaints are liars. The various arguments and contentions on the part of the appellant are substantially disputed. It was contended that this litigation raises legal issues of public importance which transcend the interest of the litigants and in particular an issue of public importance was identified as being whether a defendant in a defamation suit can ever plead justification in relation to an utterance to the effect that "a victim of sexual abuse is a liar - on the sole basis that the victim delayed in bringing the complaint." (para. 18 of the submissions of the respondents)

45. It was also contended that the public importance of the litigation is underscored by the fact that the appellant placed reliance on the defence of "honest opinion" on a matter of public interest. The public importance contended for by the respondents in this regard included, as stated in para. 19 of the respondents' written submissions whether, "third parties with no direct knowledge of the allegation [may] make a pronouncement that the victim is a liar – and then seek legal protection from the damage caused by calling it an "opinion". It was argued that the public importance was underscored by the facts of this case where an "opinion" was given solely to serve a political agenda in a highly publicised political campaign in order to secure the highest constitutional office in this State. Reliance was placed on the decision of Charleton J. in *Millstream Recycling Limited v. Tierney* [2010] IEHC 55 where security for costs was refused on grounds that the facts of that case disclosed matters of exceptional public importance and transcended the individual claims and counter claims of the parties.

46. In submissions for the respondents it was argued that the judge was not correct when he found that the appellant had a *prima facie* defence to the proceedings. It was contended that the respondents' claims are substantial and compelling and that the appellant has not articulated any convincing defence. Reliance was placed on the statement by the judge at para. 6 of the judgment wherein he noted:

> "The defendant knew that it was public knowledge that the plaintiffs were involved with a court case and the defendant and her brother John Brown in and around the same time and at one stage in the interview stated "much of the detail of the court case is now on social websites and a lot of people will know what we are talking about". *The defendant agreed with this, thereby confirming that the people to whom she was referring were the plaintiffs.* (emphasis added)" (para. 29 of respondent's submission).

47. It was contended that the honest opinion defence advanced pursuant to s. 20 of the Defamation Act 2009 constituted an extraordinary defence, and if it is to be ventilated, it raises serious issues of public importance. Each ground of the defence was raised and analysed and critiqued in significant detail in written legal submissions filed on behalf of the respondents. With regard to the plea of justification it was contended that it is hard to reconcile such a defence with a defence of "honest opinion" as pleaded by the appellant.

Impecuniosity

48. The respondents contend that the appellant has misinterpreted the decision of the High Court judge where he indicated he was not taking into account the alleged impecuniosity of the respondents when ultimately making a determination to refuse the application for security for costs. It is contended that the appellant is in error in arguing that it is necessary for the respondents to prove they were impecunious. In particular, it was argued that the High Court judge did not find that the respondents had not made out impecuniosity "…but rather came to the view that it was not necessary for him in the circumstances to take this into account." Reliance was placed on a line of authorities including Clarke J. (as he then was) in *Salthill Properties v. RBS* [2010] IEHC 31, [2011] 2 I.R. 441 which in turn had relied on the earlier jurisprudence including Maguire J. in *Heaney v. Malocca* [1958] 1 I.R. 111 and the proposition that; "Poverty on the part of the plaintiff is not automatically a reason for refusing or granting an order for security for costs." In argument it was contended on behalf of the respondents that the High Court had extremely persuasive evidence before it

with regard to the inability of the respondents to afford the level of security for costs being sought.

49. It was argued that once the judge found that the respondents were seeking to bring a genuine claim where they alleged very serious matters it was also open to him to refuse security for costs on the basis that the respondents' impecuniosity meant that such a genuine claim could not be shut out.

50. In regard to the issue of delay, it was argued that it is open to this Court to reverse the High Court judge's findings in regard to delay notwithstanding the absence of any cross appeal.

51. The court was ultimately undecided as to the alleged impecuniosity of the respondents. The respondents did not appeal against that conclusion. Earlier, at paragraph 15 of the judgment, the judge had observed after noting the suggestion of counsel for the respondents that were security for costs ordered by the Court, it would bring the respondents' claim to an end; "This may well be the case, but it does and should not influence the Court in any way." Neither was that assessment the subject of a cross appeal by the respondents.

Delay

52. Arguments regarding alleged delay on the part of the appellant in bringing the application for security for costs were considered in detail by the judge during the course of the interlocutory hearing. It is noteworthy that the judge's clear finding that there was no appreciable delay on the part of the appellant (see para. 26 of judgment) has not been appealed against. Neither is his conclusion in this regard (at para. 27 of the judgment) the subject of a cross appeal:

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

Consideration of findings of trial judge

53. In the instant case the judge reached his conclusion to refuse the application for security for costs on the basis that the comments made by the appellant were so made in the currency of her running for the position of Head of State and were therefore a matter of public interest.

54. The level of exceptionalism that was a pre-requisite to the trial judge reaching a finding that a matter of national importance existed in this litigation sufficient to entitle him to refuse to grant security for costs was described by Charleton J. in *Oltech*, at para. 22, referred to above and was reiterated by Haughton J in *Quinn Insurance Limited (Under Administration) v. PricewaterhouseCoopers (A Firm)* [2018] IEHC 16 in the following terms:

> "86. Also the mere fact that a case excites public interest, or involves an attempt by the state or a government agency to recover assets or damages for the public benefit, does not of itself establish exceptional public interest."

55. Laffoy J. in *Village Residents Association Ltd. v. An Bord Pleanála & Ors. (No.2)* [2000] 4 I.R. 321 identified the test for "special circumstances" as being:

> "Whether the point is of such gravity and importance as to transcend the interests of the parties actually before the court and whether it is in the interests of the common good that the law be clarified so as to enable it to be administered not only in the instant case but in future cases also…"

56. In *Webprint Concepts Limited v. Thomas Crosbie Printers Limited & Ors.* [2013] IEHC 359, Finlay Geoghegan J. said that the test in *Lancefort* was:

> ". . not the only permissible formulation of how the Court would identify what has been sometimes referred to as 'a point of law of exceptional public importance' as per Charleton J. in *Millstream Recycling v. Gerard Tierney and Newtownlodge Ltd.* [2010] IEHC 55.
>
> 69. Central to all the formulations is that both the point of law and the requirement or desirability that it be determined must transcend the interests of the parties before the Court. The Court may also take into account whether the law relating to the alleged point of public importance is in a state of uncertainty such that it is in the common good that the law be clarified so as to enable the courts to administer justice, not only in the present case but also future cases."

57. In the instant case, by contrast, the litigation is between private individuals who are close relatives. The litigation has its origin in claims of sexual assault alleged to have been committed upon one of the respondents many years before by another family member who is not a party to this litigation. The proximate basis for the litigation, which includes a claim for damages, lies in the alleged defamatory utterances of the appellant by way of reaction to those allegations.

58. One of the respondents contends that she was the victim of sexual abuse by a close relative in the 1970's. The statements of claim delivered demonstrate that these claims are between private entities to resolve private grievances and are in substance compensatory seeking as they do damages, punitive damages and aggravated damages, for alleged defamation. The cases will in due course be tried before a jury.

59. What fact in contention between the litigants can be said to so keenly affect the national interest as to amount to a matter of national importance? The answer is patently none. From the respondents' point of view the issues are deeply personal and concern events they contend occurred in the private life of Ms. Gorrell between approximately 1976 and 1985 in Wembley and Torquay, England and in the respondents' family home in Iowa, USA. At no point is it contended that any acts of abuse took place in this State.

60. At its height what is at issue is a private family dispute regarding alleged events of the past and the conduct and reactions and responses of the appellant to the allegations. The comments made by the appellant, whilst made in the course of the campaign, did not relate to her campaigning for the position of President of Ireland.

61. There is no basis for suggesting that the issues in this private litigation bear any comparison to the devastating national impact under consideration in *Millstream Recycling v. Tierney* where at the height of the economic crash deleterious material in the form of contaminated pig feed caused toxins to enter the food chain resulting in Irish products being withdrawn from sale across the globe. As was noted by Charleton J. referring to the facts of the latter case in the *Oltech* decision:

> "It is only in the most extreme circumstances that any fact in contention between litigants can keenly affect the public interest. Where that occurs, this can be a special factor in refusing to order security for costs. An example is the issue of pig feed contamination and the withdrawal of Irish pork products on the world market that was part of the decision to refuse security for costs in *Millstream Recycling v. Tierney* [2010] I.E.H.C. 55 (Unreported, High Court, Charleton J., 9th March, 2010). The result of that contamination was the condemnation throughout international markets of Irish pork products as unfit for human consumption. An important industry was affected and not just in a manner confined to an individual sector. The entire reputation of Ireland as a source of healthy agricultural food was undermined for a substantial time by the circumstances that led to that case." (para. 22)

Special circumstances justifying a refusal of security for costs

62. The jurisprudence in regard to this aspect has developed primarily in the context of limited liability companies and the jurisdiction to order that costs be lodged in favour of a defendant in advance of a trial pursuant to s. 390 of the Companies Act of 1963, as amended.

63. The principles that have been developed in the jurisprudence have also been invoked in appropriate cases where private individuals are concerned. There are a variety of special circumstances which have been identified in the case law as allowing the court, in its discretion, to decline to make an order for security for costs.

64. As to what might constitute such special circumstances the decision of Charleton J. in the High Court in *Oltech* is an important starting point not least for its succinctness but also for its comprehensive analysis of the jurisprudence. During his analysis Charleton J. emphasised:

> "…it must again be remembered that no judge has an entitlement at an interlocutory stage to decide facts. Instead, the function of a court is to attempt to discern what is potentially, and on a reasonable basis, capable of proof at trial." (para. 16)

65. The *Oltech* judgment is also authority for the proposition that the burden of demonstrating special factors rests on the party asserting it once a defendant has shown a prima facie defence and further that the plaintiffs are not capable of meeting a costs order if made against them.

66. In the instant case it is noteworthy that it was no part of the respondents' case before the High Court during the lengthy interlocutory application hearing that their alleged inability to pay costs was due to any alleged wrongdoing on the part of the appellant.

67. It will be recalled that in *Oltech* Charleton J. identified the very high threshold to be met by a plaintiff who seeks that the court exercise its discretion to refuse security for costs to a defendant otherwise entitled to such an order. He characterised the third factor which might disentitle a defendant, in the court's discretion, to an order for security for costs as:

> "…a point of law for decision in the case may be so important that the process of the case should not be interrupted. To establish this special factor, a heavy burden is undertaken by the party seeking to invoke this. A point of law necessary to exercise the discretion against the order must not be simply any be *(sic)* ordinary point of law that might be argued before the courts on a month to month basis. Instead, to refuse an order on this basis, a point of law must be identified which transcends the interest of the parties and requires as a matter of public interest that it should be decided for the benefit of the community as a whole…" (para. 20)

"True or Not"

68. Separately, the judge expressed the view that the nature of the comments made by the appellant ought to be scrutinised to determine whether or not a special circumstance existed that ought to cause him to exercise his discretion not to grant security for costs. From para. 35 onwards in his judgment he embarks on a consideration and evaluation of what he describes as "The Nature of the Comments Made by the Defendant: Whether True or Not". The appropriateness of this exercise by the judge will be considered later.

69. At para. 35 of the trial judge's judgment he addresses matters under the following heading: "The Nature of the Comments Made by the Defendant: Whether True or Not". In the ensuing paragraphs the trial judge considers the veracity or otherwise of part of what the appellant stated when interviewed. In particular he appears to assess the reasonableness or otherwise of what was stated by the appellant to the journalist in relation to the delay in making any complaint on the part of Ms. Gorrell.

70. At the level of principle, such an assessment formed no part of the exercise in determining the interlocutory application which was before him. In embarking on this assessment he proceeded to decide whether the comments were, in his own words, "true or not". In my view he fell into error in so doing in circumstances where questions of fact will fall to be tried by a jury.

Affidavit of Prof. Harry Ferguson

71. An unusual feature in the judgment is the introduction by the judge of some excerpts from affidavits sworn in the unconnected S.H. proceedings in 2002 and 2003 to which I have already referred. One of his affidavits, possibly dated 20th April 2003, was cited by the Supreme Court in its judgment in a judicial review matter in 2006 referred to further below. The High Court judge deploys some of those excerpts in the exercise he set himself of deciding whether certain views and statements of the appellant were "true or not".

72. At para. 40 of the judgment the trial judge states:

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

73. Quite obviously Dr. Harry Ferguson did not swear an affidavit on behalf of either the respondents or the appellants in this application. The entirety of any of the affidavits, with their Reports and exhibits, sworn by him in *S.H.* was not before the High Court.

74. In arriving at his conclusions, it appears that the judge considered the Supreme Court decision in *S.H. v. The DPP* and extrapolated views attributed to an affidavit of Dr. Ferguson, parts only of which were referred to by the Supreme Court in its

judgment in that case as the basis for an evaluation and assessment as to whether the views of the appellant were " true or false" and whether same were consistent with the appellant's defence of truth.

75. He found that statements by the appellant did not accord with selective extracts from the affidavit of Dr. Ferguson sworn in 2003 and concluded; "This contention squarely contradicts the comments made by the defendant in the currency of the presidential campaign." I very respectfully disagree with the process of deduction employed.

76. This approach by the trial judge does not accord with established jurisprudence and has the unfortunate consequence of achieving what the trial judge himself was expressly seeking to avoid when he stated that; "This Court does not wish to traverse into the merits of the plaintiffs' claim, namely whether the allegations made by the defendant were false and defamatory or not." (para. 40)

77. The judgment in *S.H. v. The DPP* is an important one insofar as it is authority for the proposition that the appropriate test to be applied when it is sought to prohibit a criminal trial on grounds of a complainant's delay is whether the delay has resulted in prejudice to an accused such as would give rise to a real or serious risk of an unfair trial. It is also authority for the proposition that it is not necessary for a court to enquire into the reasons for the delay of whether an accused had exercised dominion and control over a complainant or to make assumptions as to the truth of the complaints. The decision is not relevant to the matters at issue in this interlocutory application.

"Litigating claims involving allegations of sexual abuse in a civil context"
78. At para. 40 of his judgment the trial judge stated; "… this Court finds that there is a *public value* [this Court's emphasis] in litigating claims involving allegations of sexual abuse in a civil context, where the onus of proof, beyond reasonable doubt, was not established in a criminal trial." In my view, the trial judge fell into error in finding a public value arose in the present claims for damages for defamation, even though the claims arise against a background of allegations of sexual abuse.

79. The affidavit evidence of Prof. Harry Ferguson insofar as it can be gleaned from the written judgment of the Supreme Court in *S.H. v. The DPP* cannot be dispositive of any material fact of relevance to the determination of the High Court of this interlocutory application for security for costs.

80. Any public interest in the private dispute between the family members involved in this litigation drained away at the conclusion of the presidential election and none subsisted at the date of institution of these proceedings on 1st December 2011.

81. It must be reiterated that the individual against whom allegations of sexual abuse are made is not a party to these proceedings. These are not "proceedings involving allegations of sexual abuse in a civil context" but rather defamation proceedings to which the alleged perpetrator of abuse is not a party. There is "accordingly" no link between the concluded criminal process and these civil defamation claims.

82. I am satisfied accordingly that the judge fell into error insofar as he found it to be a relevant consideration in this case that there was value in litigating claims involving allegations of sexual abuse in a civil context. In reaching this view he materially mischaracterised the proceedings before him to the detriment of the appellant.

Conclusions
83. The High Court's findings that:

- the appellant has a *bona fide* defence upon the merits to the claims brought by both respondents;

- there was no delay on the part of the appellant in bringing the application for security for costs;

- the respondents have failed to discharge the burden of proof to satisfy the High Court as to their alleged impecuniosity

have not been the subject of any cross appeal.

84. I am satisfied that the trial judge was correct in acknowledging that in determining an application for security for costs it is not appropriate for the court to embark upon a substantive assessment of the merits of the respective claims of the parties. As was outlined by Charleton J. in *Millstream Recycling* the primary function of the court in an interlocutory application for security for costs is to follow the approach mandated by the jurisprudence.

85. The trial judge correctly concluded on the evidence that the appellant had indeed established on affidavit *a prima facie* defence to the respondents' claims which was capable of succeeding at trial before a jury. It is significant that there has been no cross appeal against that finding of the judge.

86. Nowhere is a valid point of law identified by the judge or the respondents which in the words of Charleton J. in *Oltech* "transcends the interest of the parties" such as requires as a matter of public interest that it should be decided for the benefit of the community as a whole.

87. The statements made by the appellant relate to a private dispute between herself on the one hand and her sister and her niece on the other. That it got media coverage at the time was merely a by-product of the fact that the appellant was a candidate in the presidential election which was in train at the time.

88. The proceedings concern a claim for damages for defamation and cannot be reasonably characterised, as was done by the trial judge, as being litigation involving "allegations of sexual abuse in a civil context".

89. The respondents failed to discharge the burden of proof with regard to the issue of their impecuniosity.

90. The trial judge erred in placing reliance on reported excerpts from an affidavit that was not before the court and which was apparently alluded to in a non-relevant Supreme Court decision of years before.

91. The trial judge erred in entering into an assessment of the merits of the appellant's defence of truth.

92. In my view, the appeal ought to be allowed, and this Court should order that security for costs be provided.

Quantum of security for costs

93. At the hearing in the High Court it was contended on behalf of the respondents that after the event insurance policies that had been put in place were of "transcendental importance" and offered a complete answer to the appellant's application for security for costs. However, by the time the matter came on for hearing in this Court by way of appeal it transpired that the said insurance policies were no longer in place. This is a defamation suit. It is appropriate to take judicial notice of the very high costs arising in general in defamation suits which are heard before juries. Whilst Messrs. Flynn & O'Donnell put forward an estimate of €189,190 in respect of the respondents' projected costs on balance I conclude that same represents an under-statement of the likely exposure of the appellant to costs. Indeed, since this estimate was prepared by Flynn & O'Donnell the security for costs motion itself has ran for three days in the High Court and thereafter a reserved judgment was delivered. The matter has further been the subject of an appeal to this Court. I am satisfied on balance that the estimates of the appellant regarding costs are considerably more realistic.

94. The discretion to be exercised by the court on an application for security of costs pursuant to Order 31, r. 12, is an exercise of its inherent jurisdiction pursuant to the rules. It is customary to require as security for costs an amount of not more than about one third of the costs which would probably be incurred by the appellant. It is reasonable to presume that the two actions will proceed together and that this Court should accordingly fix security for costs in the sum of €150,000 to be apportioned between the respondents equally.

95. The Court will hear the parties as to the time to be allowed for the lodgement of this sum by way of security for costs.