

THE HIGH COURT

[2022] IEHC 135
[Record No. 2017/4816 P]

BETWEEN:

GERRY ADAMS

PLAINTIFF

AND

BRITISH BROADCASTING CORPORATION

DEFENDANT

JUDGMENT of Ms. Justice Emily Egan delivered on the 11th day of March 2022

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Introduction

1. In the above defamation proceedings, two motions are brought before the court. First, the plaintiff seeks to strike out part of the defence. Second, the defendant seeks discovery. I will deal separately with each but, before doing so, I will consider the factual background and the pleadings in this case.

Factual Background

2. In September, 2016, the defendant broadcast an episode of the “*Spotlight*” television programme entitled “*Spy in the IRA*” (“*the programme*”). The following day, the defendant published an article on its website with the headline “*Gerry Adams ‘sanctioned Denis Donaldson killing’*” (“*the article*”). The article is not lengthy and it is important to set out its full text:

“A man who says he was a former IRA and Sinn Féin member turned British agent has claimed Sinn Féin leader Gerry Adams sanctioned the killing of Denis Donaldson.

He made the allegation to the BBC NI’s Spotlight programme on Tuesday.

*Mr Donaldson **was shot dead** months after admitting in 2005 that he had been an MI5 agent for more than 20 years.*

Three years later, the Real IRA said it was responsible. Mr Adams has denied any involvement in the killing.

Life and death of secret agent

“I specifically and categorically refute these unsubstantiated allegations”, said Mr Adams.

The Spotlight allegations were “part of the British security agencies ongoing attempts to smear republicans and cover-up their own actions”, he added.

“There is a need for all these agencies to fully co-operate with the Ombudsman’s investigation into the role of the police in the events that led to the killing of Denis Donaldson and for the Gardaí to expedite their investigation to bring those responsible to justice.”

The Sinn Féin leader said he would “continue to support the family of Mr Donaldson to achieve truth and justice”.

Ulster Unionist MLA Doug Beattie said Mr Adams should take legal action against the BBC if the allegations were untrue.

“If not, he needs to explain why not,” said Mr Beattie. “All we have heard so far is a weak denial.”

Murder sanctioned?

Mr Donaldson had worked for Sinn Féin as an administrator at Stormont. He was killed at a remote Donegal cottage in 2006.

A man who says he worked as an informer for the intelligence branch of the police told Spotlight that Mr Adams sanctioned the murder.

The former spy was in the IRA and Sinn Féin. He cannot be identified because of fears about his safety.

What Spotlight was told

Agent: I know from my experience in the IRA that murders have to be approved by the leadership. They have to be given approval by the leadership of the IRA and the military leadership of the IRA.

Presenter: Who are you specifically referring to?

Agent: Gerry Adams, he gives the final say.

The informer told Spotlight that murders had to be approved by the political and military leadership of the IRA.

In a statement, Mr Adams' solicitor said the Sinn Féin leader "has no knowledge of and had no involvement whatsoever in the killing of Denis Donaldson".

He added that Mr Adams "categorically denied the unsubstantiated allegation that he was consulted about an alleged IRA army council decision or that he had the final say on what had been sanctioned".

Days after the murder, the IRA said it was not involved in Mr Donaldson's death.

But security sources have told Spotlight that intelligence received following the killing contradicted the IRA's denial."

Summons and statement of claim

3. The plaintiff commenced proceedings by plenary summons dated 26th May, 2017 claiming that the programme and article were defamatory in that the words contained therein meant, and were understood to mean, in their natural and ordinary meaning and/or by way of innuendo, that he had sanctioned and approved the murder of Denis Donaldson.

Defence

4. On 15th June, 2018, the defendant delivered its defence. Different paragraphs of the defence are of relevance to each of the two applications before the court.

Pleas relevant to both application to strike out and to discovery application

5. At paragraphs 14 to 20 of the defence, the defendant invokes the defence of qualified privilege pursuant to s. 18 of the Defamation Act 2009 (“the 2009 Act”) and upon the defence of fair and reasonable publication on a matter of public interest pursuant to s. 26 of the 2009 Act. The basis of each defence is then pleaded and particularised.

6. It is pleaded that the programme and the article were published in good faith and in the course of, and for the purposes of, the discussion of subjects of public interest, the discussion of which was for the public’s benefit; that the issues discussed in the programme and article were of vital importance and interest to the people of Ireland; that the manner and extent of publication did not exceed that which was reasonably sufficient; that it was fair and reasonable to publish the programme and article which constituted responsible journalism and were the result of careful investigation by the defendant; that the defendant had a duty to broadcast the programme and publish the article; that viewers of the programme and readers of the article had a corresponding and legitimate interest in them and/or were entitled to know about the information and views therein; that the programme and article were the product of responsible journalism; that reasonable steps were taken to assess the veracity of the opinions of the source named “*Martin*”; and that the language was balanced and fair and drew distinctions between suspicions, allegations and facts.

7. Paragraph 16 then sets out particulars of the matters which the defendant intends to establish to demonstrate fair and reasonable publication including the following:

- The programme and article reported “*Martin’s*” beliefs, based on his experience in the IRA, that the murder would have been sanctioned by the person at the top of the republican movement, namely the Plaintiff. The

programme and article also reported the Plaintiff's statement that he had no knowledge of and no involvement whatsoever in the killing of Denis Donaldson and the Plaintiff's categorical denial that he was consulted about an alleged IRA army council decision or that he had a final say in what had been sanctioned. It was also broadcast that it was understood that the Garda investigation into the murder was focussed on a separate individual with links to dissident republicans.

- The allegations surrounding the role of the IRA in the murder of Denis Donaldson and the plaintiff's alleged sanction of the murder were treated by the programme and presented to the viewer as allegations only. The article did likewise. It was represented that the IRA publicly denied being involved in the murder which conflicted with "*Martin's*" account that he was informed by an active member of the IRA that the IRA had killed Denis Donaldson.
- "*Martin*" stated his opinion on the Plaintiff's role in the murder of Denis Donaldson. The programme and article reported that the Defendant had spoken to other sources which appeared to support the involvement of the IRA in the murder; that responsibility for the crime had been claimed by dissident republicans; and that an individual linked to the dissidents was being treated as a suspect by An Garda Síochána.
- As context, and in order to allow viewers to assess the validity of "*Martin's*" claim, the programme presented the understanding of the Spotlight team that by 2006, prior to Denis Donaldson's murder, the Plaintiff had stepped aside from the IRA army council.

- The content of the programme was informed by the journalists' pre-existing knowledge of allegations relating to the Plaintiff's involvement with the IRA and the many credible allegations made against him relating to that role and his responsibility for IRA atrocities.
- The programme did not draw conclusions but presented the material for consideration by the viewers.

8. Essentially therefore, in respect of the s. 26 defence these particulars repeat a significant amount of detail contained in the programme and in the article as the basis for the assertion that the defendant had a duty to publish the material and that the public had a corresponding and legitimate interest in viewing or reading the material.

Pleas relevant to discovery application

9. Pursuant to s. 31 (6)(a) of the 2009 Act a defendant, for the purposes of mitigating damages, may give evidence, with leave of the court, on any matter which has a bearing on the plaintiff's reputation provided that it relates to matters connected with the defamatory statement. Paragraphs 21 to 26 of the defence advance pleas in relation to the plaintiff's reputation, which, together with the above pleas in relation to the s. 26 defence, ground the defendant's discovery application.

10. This aspect of the defence is pleaded in two parts. First paragraph 22 of the defence pleads that the defendant, with leave of the court, will give evidence on the following matters which have a bearing on the plaintiff's reputation:

- “(a) The Plaintiff was for many years on the IRA Army Council;*
- (b) The Plaintiff was for many years a leading member of the IRA;*
- (c) During the Plaintiff's period of leadership and/or membership the IRA engaged in a campaign of horrific murder and violence, particularly in Northern Ireland and the United Kingdom, and engaged in thousands of acts of murder;*

(d) The Plaintiff continued to play a very important and senior role in the IRA up to and including the time of the Denis Donaldson murder;

(e) The Plaintiff has continuously lied about his membership of the IRA;

(f) The Plaintiff has a history of not condemning the killing of informers by the IRA and many years previously had said that anyone living in West Belfast knows that the consequence for informing is death.”

11. Paragraph 23 of the defence pleads that the plaintiff’s public reputation is that:

“(a) He was for many years on the IRA Army Council;

(b) He was for many years a leading member of the IRA;

(c) He has continuously lied about his membership of the IRA;

(d) He continued to be involved in a very important and senior role at the time of the Denis Donaldson murder;

(e) The Plaintiff had a reputation for not condemning the killing of informers and/or implicitly supporting the same;

(f) The Plaintiff believed that the consequence of informing on the IRA is death.”

12. The defence pleads that the publication of the words complained of by the plaintiff were not capable of damaging and did not damage the plaintiff’s reputation and that, if necessary, the defendant will rely upon these matters in mitigation of damages. Discovery of documents relating to these pleas is sought by the defendant.

Judgment in respect of previous applications

13. No reply has been delivered to the defence. This litigation has been the subject of a previous reserved judgment by Meenan J. in respect of two previous motions brought by the plaintiff seeking discovery and to compel replies to a notice for particulars. Meenan J. ordered that the defendant make discovery of various categories of documents but refused the plaintiff’s motion to compel replies to the notice for particulars.

First motion: plaintiff's motion to strike out parts of the defendant's defence

Structure

14. I will explain the factual basis for the plaintiff's application to strike out; refer to the principles applicable to an application to strike out in defamation proceedings; consider the key line of authority relied upon by the plaintiff in support of his application, and comment upon its interaction with the single publication rule in s. 11 of the 2009 Act.

Factual basis for the application

15. The plaintiff seeks an order pursuant to O. 19, r. 27 of the Rules of the Superior Courts ("the Rules") and/or pursuant to the inherent jurisdiction of the court "*striking out the defence under section 26 of the Defamation Act and/or qualified privilege pursuant to section 18 of the said Act and/or the common law to the plaintiff's claim in respect of the article published by the defendant on 21st September 2016*".

16. Although the notice of motion seeks to strike out both the s. 26 defence and the s. 18 qualified privilege defence, the application, as argued, was essentially confined to the former. This judgment will be similarly focussed. The plaintiff does not indicate which particular paragraphs of the defence should be struck out, nor exhibit a proposed amended defence with the proposed deletions.

17. The application to strike out certain paragraphs of the defence is limited to the plaintiff's claim in respect of the article. No similar relief is sought in respect of the programme. There are three principal reasons for this.

18. First, the plaintiff emphasises that the article is different to the programme in an important material respect. Although both represented that the IRA denied any involvement in the murder of Mr. Donaldson, for which the Real IRA claimed responsibility in 2009, the article stated that intelligence received following the murder

contradicted the IRA's denial. The article did not inform the reader that an ongoing Garda investigation was focused on a separate individual, originally from County Donegal, but then based outside the State, described as "*sympathetic to dissident republicanism*". The plaintiff alleges that the failure to include this information is indicative of bad faith and cannot be fair and reasonable journalism.

19. Secondly, in July, 2019, the defendant published on its website an article about an individual, to be charged with the murder of Mr. Donaldson, who was identified elsewhere in the media to be one Anton Duffy, a Donegal man and dissident republican now serving a seventeen-year jail sentence in Scotland for plotting to murder the former UDA leader, Johnny "Mad Dog" Adair. The plaintiff observes that, even at this late stage and in the light of the significant breakthrough in the Garda investigation, the defendant failed to remove the defamatory article from its website, or qualify or correct it in any way by means of a "*Loutchansky notice*". (*Loutchansky v. Times Independent Newspapers* [2008] QB 783) (as to which see below).

20. Thirdly, following the broadcast of the programme, the plaintiff requested its immediate removal and an undertaking not to republish any of the material. The defendant refused to give such an undertaking but, the plaintiff says, ultimately removed access to the programme on BBC iPlayer. Incidentally, this is disputed by the defendant which maintains that the programme is still capable of being viewed as before on its iPlayer, albeit not accessible in Ireland. However the plaintiff's key point is that the article has continued to be published on the defendant's website and has remained accessible online without qualification or amendment; and in particular, that it does not alert the reader that it is the subject of a legal complaint, resulting in defamation proceedings in which the defendant does not plead justification. Critical therefore to the plaintiff's application to strike out is the fact that the defence admits publication and

(although denying that the words were defamatory, denying the meaning asserted by the plaintiff and denying damage to the plaintiff's reputation) does not stand over the truth of what the plaintiff contends is its central allegation: that the plaintiff sanctioned and approved the murder of Mr. Donaldson. The plaintiff contends that the foregoing should have led to the removal of the article or, at the very least, to a qualifying notice. Instead, the article remains available, essentially in its original form, on the internet.

21. The plaintiff's argument is that from the date of delivery of the defence (at the latest), the continued unamended publication by the defendant of the article on its website was not "*fair and reasonable publication*"; and that the defence, under s. 26 of the 2009 Act should be struck out as bound to fail.

Test to be applied in application to strike out defence

22. The plaintiff's motion invokes both O. 19 r. 27 of the Rules and the inherent jurisdiction of the court. The former permits a court, at any stage of proceedings, to strike out any part of the proceedings that may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial. The plaintiff does not contend that any part of the defendant's defence is scandalous or embarrassing, but that the pleas to the effect that the article benefit from the s. 26 defence are, as a matter of law unsustainable and for that reason should be considered unnecessary and/or prejudicial with the result that they should be struck out. Alternatively, the plaintiff places reliance upon the inherent jurisdiction of the court to strike out or stay proceedings, if they are frivolous and vexatious or bound to fail, as articulated by Costello J. in *Barry v. Buckley* [1981] IR 306.

23. The principles applicable to applications to strike out pursuant to O. 19 r. 27 and/or pursuant to the inherent jurisdiction of the court are well known. However, it is helpful to refer to a recent application of those principles in defamation proceedings. In

Declan Ganley v. Raidió Telifis Éireann [2019] IECA 18, the plaintiff brought an application to strike out the defence of justification. Irvine J. (as she then was) observed that the rule was designed to ensure that neither party is required to absorb unnecessary expense or unwarranted delay in responding to a pleading wholly unconnected with the substance of the dispute.

24. The following statements of principle in relation to an application to strike out a “*meanings defence*” emerge from Irvine J.’s judgment:

25. First, the bar for such application is set relatively high. The judge should strike out only if satisfied that it would be perverse for the jury to uphold the relevant plea. In the present case, the question is whether the failure to attach an appropriate *Loutchansky* notice means that it would be perverse for the jury to uphold the potential s. 26 defence. It is ultimately for the jury, properly directed, to determine whether the failure to attach a *Loutchansky* notice means that it was not fair and reasonable to continue to publish the article. This will depend upon the jury’s assessment of the various factors and considerations set out in s. 26 (2), together with such other matters as the jury, properly directed, considers relevant. Whether or not the s. 26 defence is successful will depend upon the evidence given in this case, the jury’s assessment of that evidence and the resolution of certain complex issues of law, as mentioned below.

26. Secondly, Irvine J. observed that a defendant is entitled to plead a “*meanings defence*” so as to justify any reasonable meaning of the words published which a jury, properly directed, might find to be the real meaning. The range of potentially permissible meanings must be allowed to stand for the jury’s consideration. A judge must be careful not to supplant his or her own judgment for that of the jury. A judge should not withhold a matter from the jury unless satisfied that it would be wholly unreasonable for the jury to attribute a libellous meaning to the words complained of.

The same logic must apply in this case. Therefore, the present inquiry is whether it would be wholly unreasonable for the jury to uphold the s. 26 defence.

27. Thirdly, a judge's jurisdiction to strike out some aspect of a defence proposing an alternative meaning to the words alleged to be defamatory, should be sparingly invoked. Similarly, the s. 26 defence should only be struck out, thereby effectively withdrawing it from the jury, only if it is clear that the defence, and the particulars pleaded in relation thereto, cannot reasonably disclose an answer to the plaintiff's claim.

28. Overall, the principles applying to an application to strike out a pleading in a defamation action are the same as those applying in other suits. Nonetheless the court must be aware that, in defamation proceedings, the ultimate decision maker in respect of the success or otherwise of the relevant pleas is the jury not the judge. The extent to which it is appropriate for the court to assess the evidence on a motion to dismiss as bound to fail is always extremely limited. However the difficulty in acceding to such an application in a defamation action is particularly acute. The court must be confident that no matter what may arise on discovery or at the trial of the action, the jury could not uphold the defence as pleaded.

29. Furthermore, as indicated by Clarke J. (as he then was) in *Moylist Construction Ltd v. Doheny* [2016] 2 IR 283, a court ought not entertain a strike out application where the legal issues arising are complex and require the type of careful analysis which can only be carried out safely at a full trial, against the backdrop of facts when fully explored and established. This observation is of particular relevance in this application because, as observed by Collins J. in *Desmond v. The Irish Times Ltd* [2020] IEHC 95, no significant guidance is available from the authorities on the scope and effect of the new s. 26 defence. Further, there is no authority on the two specific legal issues arising in the present application; namely whether a failure to attach a *Loutchansky* notice to a

publication would foreclose a successful s. 26 defence and the impact of the single publication rule on the *Loutchansky* line of authority.

Plaintiff's key line of authority; Loutchansky v. Times Independent Newspapers [2008] QB 783

30. S. 26 of the 2009 Act provides in material part as follows:

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

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

(i) in good faith, and

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

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

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

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

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

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

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

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

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

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

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

(h) the extent to which the plaintiff's version of events was represented in the publication concerned and given the same or similar prominence as was given to the statement concerned;

(i) if the plaintiff's version of events was not so represented, the extent to which a reasonable attempt was made by the publisher to obtain and publish a response from that person; and

(j) the attempts made, and the means used, by the defendant to verify the assertions and allegations concerning the plaintiff in the statement.”

31. It is neither necessary nor appropriate for the court to reach any definitive view as to the precise nature and scope of the defence of fair and reasonable publication in order to deal with this application. However, as in *Desmond*, it is necessary for the court to consider the general contours of the defence given that the parties’ respective positions on the application to strike out the defence reflect different views of the scope and effect of s. 26.

32. The key authority relied upon by the plaintiff is *Loutchansky v. Times Independent Newspapers* [2008] QB 783, in which the English Court of Appeal considered the impact of certain post publication behaviour of the defendant on the *Reynolds* defence (*Reynolds v. Times Newspapers Ltd.* [1999] 1 All ER 609). In short, the *Reynolds* defence protects a journalist, who publishes material in the public interest and who has acted in accordance with the standards of “*responsible journalism*”, even though the truth of the published material cannot be established. As Collins J. commented in *Desmond*, the s. 26 defence is similar to *Reynolds*, although there are undoubtedly material differences between the two. Collins J. further observed that there is significant uncertainty as to whether the *Reynolds* defence is part of Irish law and, if so, whether it survived the enactment of s. 15 of the 2009 Act. This uncertainty is not however of immediate relevance to the present application which centres around the decision of the court in *Loutchansky*.

33. In *Loutchansky*, the defendants published two articles in a newspaper accusing the claimant of involvement in criminal activities. The articles were also published on the defendant’s internet website and remained available as part of their internet archive material. The defendants claimed qualified privilege on the ground that they had a duty to publish, and the public had a right to know, the allegations in question. The defendant

argued that the defence of *Reynolds* qualified privilege attached to the ongoing publication of the internet archive material in the same manner that it did to the original newspaper publication. The plaintiff contended that although the internet articles had first been placed on the website more than a year earlier, their continued publication, without reference to the fact that the original articles were the subject of defamation proceedings in which a plea of justification was not advanced, disentitled the defendant to rely upon the defence. The Court of Appeal upheld the first instance judge's decision to strike out the defence of qualified privilege stating:

“A subsidiary reason given by the judge for striking out the defence was that the defendants had repeatedly republished on the internet defamatory material that was the subject of a defamation action in which they were not seeking to justify the truth of the allegations without publishing any qualification to draw to the reader's attention the fact that the truth of the articles was hotly contested. The judge considered that the republication of back numbers of “The Times” on the internet was made in materially different circumstances from those obtaining at the time of the publication of the original hard copy versions ... we agree. The failure to attach any qualification to the articles published over the period of a year on “The Times” website could not possibly be described as responsible journalism. We do not believe that it can convincingly be argued that the defendants had a Reynolds duty to publish those articles in that way without qualification. It follows that we consider that the judge was right to strike out the qualified privilege defence ...”

34. The plaintiff argues that the present case is very similar and that the failure to notify the reader that the defendant does not justify the truth of the central allegation in the article, so undermines any potential s. 26 defence that it should be struck out as bound to fail even, it seems, in respect of the initial publication of the article. .

35. The defendant observes that the factors set out in s. 26 do not expressly incorporate post publication behaviour which suggests that the presence or absence of a *Loutchansky* notice several years after publication of the article cannot be determinative of the success of a s. 26 defence.

36. This, of course, does not mean that a *Loutchansky* notice is irrelevant to the prospects of a successful s. 26 defence. In *Desmond*, Collins J. observed that whilst s.

26 (2) of the 2009 Act structures how the court (which in a defamation trial in the High Court sitting with a jury, means the jury) should determine if it was fair and reasonable to publish, that section does not limit the matters which the court may take into account. To the contrary, s. 26 (2) very clearly provides that the court “*shall...take into account such matters as it considers relevant*”. It follows that a defendant cannot circumscribe what it is required by s. 26 to establish, i.e., that “*in all of the circumstances of the case, it was fair and reasonable to publish the statement (emphasis added)*”. The omission, therefore, from s. 26 of any express reference to post publication behaviour in general, or a *Loutchansky* notice in particular, is not fatal to the plaintiff’s application to strike out the defence.

37. By the same logic, however, neither can the plaintiff circumscribe the matters which the jury may consider. Even accepting that a *Loutchansky* notice may be relevant to the assessment of whether the publication was fair and reasonable, it cannot be consistent with scheme of s. 26 to hold that its absence in this case necessarily forecloses this defence. It would be very difficult, if not impossible, for this court to decide, before evidence is given, that it would be perverse of a jury to conclude that the article does not meet the s. 26 test.

38. In any event, notwithstanding the decision on the facts by the Court of Appeal in the *Loutchansky* case, the plaintiff’s argument that the absence of such a notice is necessarily fatal to the defence is inconsistent with the general approach in English law to the *Reynolds* defence. In *Reynolds*, Lord Nicholls gave his well-known non-exhaustive list of ten factors – essentially a charter of “*responsible journalism*” – which in appropriate circumstances should be taken into account in determining whether a publisher had fulfilled the appropriate standards of ethical journalistic behaviour to benefit from the defence. However, Lord Nicholls emphasised that these factors which,

depending upon the circumstances, could be weighty, “*should not be elevated into a rigid rule of law*”. The ten factors listed are not tests or hurdles which the publication has to pass. Rather, as observed by Lord Bingham in *Jameel (Yousef) v Dow Jones & Co. Inc.* [2005] Q.B. 946, the standard of conduct required of a newspaper must be applied in a practical and flexible manner having regard to practical realities.

39. There is strength in the defendant’s argument that the plaintiff’s application appears to be an attempt to elevate certain factors, which may be of relevance to the *Reynolds* defence, into a rigid rule of law. Yet, that is at odds with the approach of the English courts generally, even to the ten factors enumerated in *Reynolds*.

40. Still less can it be urged that such rigidity ought be applied to necessarily defeat a plea of fair and reasonable publication pursuant to s. 26. Demonstrably that is not what the legislative scheme envisages. Even therefore, if the *Loutchansky* line of authority were to establish that the absence of an appropriate notice would always foreclose a *Reynolds* defence, which it does not, this could not automatically entitle the plaintiff to an order striking out a s. 26 defence.

The single publication rule

41. There is a further difficulty with the plaintiff’s reliance upon the *Loutchansky* line of authority as a basis for a finding that the s. 26 defence is bound to fail. The *Loutchansky* line of authority emerged prior to s. 8 of the English Defamation Act, 2013 which established a single publication rule for internet and other publications. On the other hand, in Ireland the 2009 Act has for some time provided for a single publication rule.

42. By way of context, it is relevant to note how the arguments unfolded in *Loutchansky*. The claimant’s argument that the failure to publish any qualification defeated the *Reynolds* defence was not in respect of the original publications but in

respect of their continued maintenance on the website after a particular time. *Times Independent Newspapers* sought to amend their pleadings to maintain that the single publication rule applied; that the date of first publication on the internet was the “single” date of publication and was the only relevant date for the assessment of liability; and that as such publication predated the developments, which the plaintiff contended led to the requirement to publish any qualification, same could not disentitle the defendant from relying upon the defence. The Court of Appeal declined the amendment sought and effectively held that the single publication rule did not apply to the internet publications and that it was a well-established principle in the English law of defamation that each individual publication of a libel gave rise to a separate cause of action, subject to its own limitation period.

43. The defendant in this case argues that the position in Ireland is entirely different as a result of ss. 11 and 38 of the 2009 Act. S. 11 of the 2009 Act provides in material part:

“11.— (1) Subject to subsection (2), a person has one cause of action only in respect of a multiple publication.

(2) A court may grant leave to a person to bring more than one defamation action in respect of a multiple publication where it considers that the interests of justice so require.

(3) In this section “multiple publication” means publication by a person of the same defamatory statement to 2 or more persons (other than the person in respect of whom the statement is made) whether contemporaneously or not.”

S. 38 (1) of the 2009 Act provides:-

“38.—(1) Section 11 of the Act of 1957 is amended—

(a) in subsection (2), by the substitution of the following paragraph for paragraph (c):

(c) A defamation action within the meaning of the Defamation Act 2009 shall not be brought after the expiration of—

(i) one year, or

(ii) such longer period as the court may direct not exceeding 2 years, from the date on which the cause of action accrued.”

S. 38 (b) of the 2009 Act clarifies the date of first publication on the internet as follows:-

“(3B) For the purposes of bringing a defamation action within the meaning of the Defamation Act 2009, the date of accrual of the cause of action shall be the date upon which the defamatory statement is first published and, where the statement is published through the medium of the internet, the date on which it is first capable of being viewed or listened to through that medium.”

44. In *Hynes v. AIB* [2019] IR 298, Binchy J. found that the combined effect of ss. 11 and 38 of the 2009 Act is that the cause of action in defamation accrues on the date of first publication and that further publication does not give rise to a separate cause of action unless the court gives leave for the issue of more than one action pursuant to s. 11 (2).

45. In this case the defendant argues that there was only one relevant publication of the article, namely on 21st September, 2016 and that it is the circumstances pertaining on that date which must be considered in relation to the availability of a defence based upon fair and reasonable publication. The failure thereafter to withdraw the publication, or to attach a qualification or clarification, cannot create a separate cause of action and consequently cannot disentitle the defendant from relying on the s. 26 defence.

46. The plaintiff argues that the defendant’s interpretation of the interplay between ss. 11, 38 and 26 is not correct; that there is a continuing obligation by the publisher to qualify an article due to a change in circumstances as and when new information comes to light, failing which the s. 26 defence will be unavailable; that even if a change in circumstances could not create a new cause of action, it would be highly relevant to an inquiry as to whether the defendant had behaved responsibly in its original application; that the factors relevant to the availability of the defence of fair and reasonable publication are not confined to the time and date of the original publication but continue thereafter. The plaintiff also emphasises that he seeks not only damages for defamation, but also an injunction to prevent ongoing and future publication of the internet article;

and that the plaintiff's right to injunct the continuing and future publication of defamatory material cannot be withdrawn by the single publication rule.

47. The impact of the single publication rule on the *Loutchansky* line of authority is unchartered legal territory even in the United Kingdom. Indeed, the court was referred to following passage from the seminal work, *Gatley on Liable and Slander* (12th Ed.) which states:-

“Application of the responsible journalism test: post-publication behaviour: When it was first mooted by Lord Lester, the proposal became s.4 of the Defamation Act 2013 included an additional element compared with the provision that reached the statute book. This was the requirement that, if a publisher was to avail itself of the defence, it would have to be able to demonstrate that it had not unreasonably refused or applied conditions to the publication of a correction of the statement complained of. That proposal was withdrawn without reference by the Government before the Committee Stage in the House of Lords, and there is no such requirement in the Act.

*A similar issue can arise, however, with regard to the availability of previously published material in archives, primarily on the internet but also to some extent in physical form. Where there is litigation it is common to attach a qualification to internet material which may have the effect of removing the sting from the material, but it will not necessarily do so. The issue arose in the **Reynolds** privilege context in **Flood v Times Newspapers Ltd**. Internet publication was continuing at the time of the hearing. It was significant that, although the claimant had been cleared by the police investigation some two to three years earlier, in 2009 the website version still had a note stating that “this article is subject to legal complaint”. Tugendhat J. held that the qualified website article was not protected by privilege from the time of the release if the report of the police investigation. The qualification failed to make clear who had made the complaint, the status of the information relied on in relation to the paper publication had changed for the worse, or that the article could no longer be regarded as a fair representation of the claimant's position. This finding was upheld in large measure by the Court of Appeal.*

It is a moot point how this scenario might be affected by the advent of the “single publication rule” for internet (and other) publication in s.8 of the Defamation Act 2013. Should a change in circumstances arise outside the effective one year limitation period, it must be assumed that no claim would lie and no correction need be made.”

48. This passage is of significance to the plaintiff's application for two reasons. First, the author acknowledges that there is legal uncertainty as to the effect of the single publication rule on the significance of post publication behaviour in the

assessment of the defence of “*responsible journalism*”. It is beyond doubt that the court ought not grant an application to dismiss a potential defence where its availability, or otherwise, involves highly complex issues of law, such as in this case.

49. Secondly, the plaintiff in the present case placed heavy reliance on *Flood v Times Newspapers Ltd* [2011] 1 W.L.R. 153 in which the Court of Appeal stressed the importance, when circumstances changed, of an appropriate “*speedy withdrawal or modification*” of a publication in order that the defence of responsible journalism be not forfeited. This is helpful to the plaintiff insofar as it goes. However, the plaintiff is not assisted by *Gatley’s* assumption that, with the advent of the single publication rule, in a case such as *Flood*, no correction needs to be made outside the initial one year period. In argument, the plaintiff accepted that such an analysis might equally apply to the legislative scheme in ss. 11, 38 and 26 of the 2009 Act.

50. In the light of this difficulty and as a fall back, the plaintiff further argues that, even accepting the correctness of *Gatley’s* analysis of the moot point raised by the interaction of the single publication rule and *Loutchansky*, the defendant ought in any event to have attached a *Loutchansky* notice to the publication during this initial one-year period; and that its failure so to do is highly relevant to the assessment of the availability of the s. 26 defence.

51. In this regard, the plaintiff points out that his solicitor’s correspondence with the defendant and the institution of these proceedings occurred well within the initial one year period and that the attention of the reader should have been drawn to these matters by an appropriate *Loutchansky* notice.

52. The defendant does not accept the plaintiff’s interpretation of the legislative scheme in ss. 11, 38 and 26 of the 2009 Act. The defendant contends that the effect of the single publication rule is more extreme; that a failure to attach a *Loutchansky* notice,

even a matter of days after an internet publication, could not create a new cause of action or negatively impact on the s. 26 defence in respect of the original publication; and that the developments relied upon by the plaintiff even within the initial one year period will not defeat the s. 26 defence.

53. It is not necessary to decide this issue in the present application. In truth, the plaintiff's argument that the defence was bound to fail is not premised on his solicitor's initiating letter and/or on the mere institution of defamation proceedings but rather on the cumulative effect of these matters together with other developments well outside initial the one-year period, by far the most critical of which is the absence of a plea of justification in the defence delivered over 20 months after publication. Even if the plaintiff's interpretation of the single publication rule were correct, this court could not safely conclude that the defendant's failure to attach a *Loutchansky* notice, solely by reason of the plaintiff's solicitor's correspondence and the defamation proceedings, necessarily means that the s. 26 defence is bound to fail.

Conclusion on application to strike out

54. In summary, therefore the question of whether the defendant is entitled to rely upon the s. 26 defence is a mixed question of law and fact. Whether in all the circumstances it was fair and reasonable to publish is for the jury to decide and the court cannot usurp its function. The resolution of this issue will depend upon the assessment by the jury of a wide range of factual matters of which the presence or absence of the *Loutchansky* notice comprises only one.

55. Further the advent of the single publication rule must be accepted as impacting upon the relevance of a *Loutchansky* notice in this case. As a result, there is a significant legal dispute between as to the relevance of the defendant's post-publication behaviour to the jury's assessment of the s. 26 defence. This is a complex legal issue which should

be explored at a full trial. It will then be for the jury and not for this court to weigh the relevance of any legally relevant post-publication behaviour on the part of the defendant in its assessment of whether the publication was, and if relevant, remains, fair and reasonable. In summary, although the presence or absence of a *Loutchansky* notice for some or all of the period post publication may well be a relevant factor, it is evidently not the only relevant factor and at this juncture there is no reason to suppose that the jury would consider its impact to be determinative.

56. I accept that, in order to prevent inefficient use of the court's time and waste of the jury's time, it is desirable that applications to strike out in defamation proceedings should be brought in advance of trial. However, granting the particular relief sought by the plaintiff would not in any event result in a substantial saving of court time, jury time or costs. The present application to strike out the s. 26 defence is confined to the defence of the article and not the programme. If the case, as currently pleaded, were to go to trial, all of the above legal issues would fall to be argued and determined and the jury would be required to consider all evidence relevant to the s. 26 defence in the context of the defence of the programme. It is difficult to see how there would be any significant saving of court time and costs merely by confining these arguments to the defence of the programme, as opposed to the article. Of course, if the s. 26 defence were struck out in respect of the article, the plaintiff might elect to proceed to trial only in respect of the article and not the programme. In such circumstances whilst other potential defences would remain open for consideration, such as the dispute in relation to meaning, the trial would undoubtedly be less lengthy and complex. However, the plaintiff has given no indication that this is a course of action which he is considering or prepared to take. Therefore it is difficult to conclude that striking out s. 26 defence,

insofar as concerns the article only, would necessarily achieve any increased efficiency in the trial.

Second motion: defendant's application for discovery

57. By letter dated 29th January, 2020, the defendant sought voluntary discovery of two categories of discovery as follows:

“Category 1. All documents evidencing, recording or relating to the plaintiff's relationship and association with the IRA.

Category 2. All documents evidencing, recording or relating to the plaintiff's knowledge of the treatment of informers or agents by the IRA and/or relating to the basis for his statement at a press conference in 1987 that “anyone else living in West Belfast knows that the consequence for informing is death.

Timeframe for categories 1 and 2 - during the plaintiff's lifetime.”

58. The plaintiff declined to agree to make voluntary discovery of any of the documents sought and resisted any order for discovery.

59. It is difficult to adjudicate upon this application in the absence of a reply to the defence. I accept that it is not necessary to deliver a reply where its purpose is to merely deny and put in issue all material statements of fact in the defence. However, as in the *Desmond* case, it is surprising that no reply has been delivered, at least joining issue with the defendant's pleas on the s. 26 defence and identifying the particular facts and circumstances by which, on the plaintiff's case, publication was not fair and reasonable. At present the court has not been informed which of the particulars pleaded in the defence at paragraph 16 (in relation the s. 26 defence) or at paragraphs 22 and 23 (in relation to the plaintiff's reputation) will be denied by the plaintiff.

60. This makes the court's task more difficult but does not prevent the court from determining this application. The plaintiff did not argue that the request for discovery was premature prior to delivering his reply. Further, as a reply is often not delivered, its mere absence cannot automatically preclude an order for discovery in favour of either party.

61. The Court of Appeal in a relatively similar position in *Desmond*, considered whether it might be appropriate to decline to rule on the application for discovery until a reply was delivered. Ultimately, the court concluded that the parameters of the central issues between the parties were sufficiently clear to enable it to determine whether the categories sought were relevant and necessary so as to avoid making any order for discovery having the flavour of an order for general discovery.

62. The same applies in this case. Although the plaintiff has not delivered a reply, the central issues between the parties, particularly in relation to the s. 26 defence were very fully argued before me. Further, insofar as concerns the particulars pleaded at paragraphs 22 and 23 in relation to the plaintiff's reputation, it is reasonable to assume that the plaintiff will deny or put in issue many of the particulars pleaded. No suggestion to the contrary was made during the hearing.

63. As the application for discovery was argued before the court over a full day, like Collins J. in *Desmond*, I do not consider that the interests of either party would be served by a failure to adjudicate on this issue.

64. The parties' arguments for and against discovery were made globally in relation to the two categories of documents sought.

65. The defendant contends that the discovery is sought in support of the defence of fair and reasonable publication under s. 26 of the 2009 Act and in support of the defendant's pleas regarding the plaintiff's reputation.

66. In respect of the s. 26 defence, paragraph 16 of the defence particularises 20 different matters which the defendant intends to establish with a view to demonstrating that the defence of fair and reasonable publication applies. These include pleas to the effect that the content of the publication was informed by the journalist's pre-existing knowledge of allegations relating to the plaintiff's connections with the IRA and IRA atrocities. The defence refers to "Martin's" belief that Mr. Donaldson's murder had been sanctioned by the person at the top of the republican movement, namely the plaintiff and to the understanding of the "Spotlight" team that the plaintiff had stepped aside from the IRA army council by 2006, prior to Mr. Donaldson's murder.

67. In respect of the plaintiff's reputation, express pleas in relation to the plaintiff's association with the IRA and his reputation for not condemning the killing by the IRA of informers are made in paragraphs 22 and 23 of the defence, as bearing upon and comprising the plaintiff's reputation.

68. The defendant argues that the documents sought at categories 1 and 2 meet the established tests of relevance and necessity set out by the Supreme Court in *Tobin v. Minister for Defence, Ireland and the Attorney General* [2019] IESC 57 as stated by Clarke C.J.:

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

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

In further considering the "relevance" of a document Clarke C.J. stated:

“I should also make one final point of general application. Relevance is, as has been pointed out, determined by reference to the pleadings. Importantly, therefore, the scope of the issues which arise for the trial and which, thus, inform the extent of the documentation which may be considered relevant, is determined by the way in which the parties choose to please their case. A plaintiff can hardly be heard to complain that they are required to make overbroad discovery if the reason for the scope of the discovery sought is because of a “kitchen sink” approach to pleading the case. Likewise, defendants have to accept that, if they deny all elements of the plaintiff’s claim, then, inevitably, the scope of the issues which will arise for trial will be expanded and the potential for documents being relevant to issues which remain alive will be greatly increased.”

As for necessity, Clarke C.J. stated:

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

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

69. The defendant submits that the plaintiff uniquely has knowledge of these issues, all of which are explored in the publications of which he complains and that the

discovery of the documents sought could either strengthen or weaken the parties' respective position on the s. 26 defence and the plaintiff's reputation.

Relevance

70. The plaintiff does not seriously contend that the documents sought are not relevant to the pleaded particulars in respect of either the s. 26 defence or the plaintiff's reputation. Rather, in respect of the s. 26 defence, the plaintiff contends that there is no conceivable way in which documents in the possession of the plaintiff, as opposed to the defendant, can inform that defence. The plaintiff argues that the defendant has the burden of proving that the publication was fair and reasonable and that the assessment of this issue is confined entirely to the state of knowledge and actions of the defendant at the time it broadcast the programme and published the article. Essentially, the plaintiff argues that documents which were not in the defendant's possession at the time of its decision to broadcast the programme and publish the articles could have no bearing, one way or another, on the decision to publish and are entirely irrelevant to the matters the jury will be obliged to determine and specifically whether it was fair and reasonable to broadcast the programme or publish the article.

71. This argument would be well made in assessing whether the defendant had acted in accordance with the standards of responsible journalism under *Reynolds* in respect of which it is clear that the journalist's behaviour is gauged by reference to the situation at the time of the publication. As a result, information which comes to light subsequent to the publication suggesting that it was justified may not be relied upon by way of *Reynolds* defence.

72. In my view that does not necessarily apply to the s. 26 defence. In *Desmond, Collins J.* declined to reach any definite view on the precise scope of the fair and reasonable publication defence but, insofar as he considered its general contours,

emphasised the broad and open textured nature of the factors falling for consideration. The facts relevant under s. 26 go beyond the journalist's state of knowledge at the time of publication. It would be unduly restrictive to conclude that, if for example discovery were made of documents, confirming that the plaintiff was for many years on the IRA army council, this would not inform an assessment of whether publication was in the course, or for the purposes, of a discussion of a subject of public interest within the meaning of s. 26 (1)(a)(ii). If the defendant can establish by credible evidence the truth of some or all of the matters pleaded at paragraphs 16, 22 and 23, that is likely to be of relevance to the jury's assessment of whether it was fair and reasonable, within the meaning of s. 26 (1)(c) to publish.

73. The documents in category 1 of which discovery is sought, are therefore potentially relevant to the s. 26 plea. The relevance to the s. 26 plea of the documents in category 2 is less apparent. The plaintiff has been deeply involved in politics in Northern Ireland for many decades and it is difficult to see how his knowledge of the treatment of informers by the IRA would necessarily be relevant to the assessment of whether the publication was fair and reasonable. The plaintiff could have acquired knowledge of such matters in a number of ways. Knowledge of such matters does not imply that the plaintiff approved of it or acquiesced in the practice discussed. Such documents would not, of themselves, indicate that the publications in issue were, for example, in the course of a discussion on a subject of public interest.

74. Turning to the pleas on reputation, even if I am incorrect in the above analysis of the relevance of the documents sought to the s. 26 plea, the category 1 documents are relevant to the pleas on reputation at paragraphs 22 and 23. Discovery of certain of the documents sought at category 1 clearly has the potential to strengthen or weaken the parties' position. Again for example, if documents were discovered which

demonstrated that the plaintiff was a member of the IRA army council, this would likely have a bearing on the jury's assessment of the damage to his reputation inflicted by the contended meaning of the publications. Therefore, whilst clearly, in the absence of a plea of justification, the defendant cannot lead any evidence to demonstrate the truth of the contended meaning of the central allegation; i.e. that the plaintiff sanctioned the murder of Mr. Donaldson, this does not mean that the defendant cannot seek to establish facts which may incline a jury to find that the contended meaning is not damaging or is less damaging than it might otherwise have been, to the plaintiff's reputation. In the context of the plaintiff's complaint that the meaning, for which he contends, has damaged his reputation, it must surely be relevant for the defendant to seek to establish that the plaintiff is connected to an organisation that, on the defendant's case, was involved in a campaign of violence for a long time. Overall, it is difficult to see how evidence, which might tend to either confirm or deny the majority of the matters pleaded at paragraphs 22 and 23 is not relevant. In argument before the court, the plaintiff did not seriously dispute that this was so.

75. Rather, in his replying affidavit and written legal submissions, the plaintiff argues that documents, which relate to the matters pleaded at paragraphs 22 and 23 and which might, for example evidence his association with the IRA or the basis for the 1987 statement about the treatment of informers, are irrelevant because they constitute only evidence showing his character and disposition but not evidence of his reputation. Vis à vis category 1, the plaintiff submitted that "*evidence of a person's alleged connection with an organisation is not evidence of that person's reputation*". Similarly, vis à vis category 2, the plaintiff submitted that "*evidence as to a person's state of knowledge is not evidence of that person's reputation*". The plaintiff contends that any

such documents, or any evidence gleaned from a perusal of such documents, would be inadmissible at any trial.

76. The courts accepts the defendant's submission that this is too narrow an interpretation of the material likely to be relevant to mitigation. Prior to the 2009 Act, in accordance with the rule in *Scott v. Sampson* [1882] 8 Q.B.D. 491, evidence of the plaintiff's reputation was admissible but not evidence of particular facts tending to show the plaintiff's character and disposition. Now, s. 31 (6)(a) of the 2009 Act provides:

“(6) The defendant in a defamation action may, for the purposes of mitigating damages, give evidence—

(a) with the leave of the court, of any matter that would have a bearing upon the reputation of the plaintiff, provided that it relates to matters connected with the defamatory statement.”

77. The 2009 Act departs from the rule in *Scott v. Sampson* [1882] 8 Q.B.D. 491. It provides for the possibility of adducing evidence, not just of reputation but also of any matters bearing upon reputation, in mitigation of damages provided the leave of the court is obtained and provided that the safeguard in s. 31(6)(a) is satisfied and the material to be adduced as evidence relates ‘*to matters connected with the defamatory statement*’.

78. Whilst not in any way deciding this issue, a strong argument can be made that many of the matters particularised at paragraphs 22 and 23 could be said to have a bearing on the plaintiff's reputation and further relate ‘*to matters connected with the defamatory statement*’. Therefore, evidence of such matters is potentially admissible, with leave of the court as having a bearing upon the plaintiff's reputation or as demonstrating his public reputation.

79. By way of rebuttal, the plaintiff argues that as evidence bearing on his reputation may only be adduced with leave of the court, discovery of the documents sought should only be granted if and when such leave is obtained.

80. There is no requirement in the Rules or in the 2009 Act that discovery must be postponed until after leave of the court is granted. Also the plaintiff's submission conflates the issue of discoverability with that of admissibility. Ultimately, leave of the court may not be granted to the defendant to lead evidence on some of the matters said to bear on reputation set out at paragraphs 22 and 23 of the defence. This possibility cannot, however prevent discovery of the documents. The discoverability of documents is not dictated by their ultimate admissibility. Even if inadmissible, the documents may result a fruitful line of inquiry by the defendant, for example leading to the identification of a particular witness relevant to the issue of the plaintiff's reputation.

81. I am not therefore persuaded that either of the plaintiff's two primary grounds for resisting discovery of the documents in category 1 are well founded.

82. However, I am not convinced that the category 2 documents are relevant. The plaintiff does not appear to dispute that he made this statement in 1987 and he clearly must have had some basis for doing so. He does not deny knowledge of the IRA's practice under discussion. Therefore, it is hard to see how documents evidencing such knowledge would advance the defendant's case. Whist "*documents evidencing the plaintiff's attitude towards this practice*" might, if a particular attitude were evinced, advance the defendant's case, an order for discovery of such a category of documentation would be vague and subjective and almost certain to lead to further applications to the court.

Necessity

83. In terms of necessity, *Tobin* makes it clear that once relevance is established, it remains the default position that discovery of the documents sought is regarded as necessary. In any event, no argument has been advanced by the plaintiff that the

discovery sought is not necessary, nor that the defendant has some other means of establishing the truth of the matters pleaded at paragraphs 22 and 23 of the defence.

Proportionality

27. The plaintiff argues that the discovery sought would be excessively burdensome. The defendant argues that it is incumbent upon a party who alleges that discovery sought is excessively burdensome to aver as to why this is so having regard to the likely volume of documentation to be assembled and examined in order to comply with an order for discovery. This is correct as a statement of general principle.

28. However, bearing in mind the plaintiff's long involvement in politics in Northern Ireland, I think that an inference could reasonably be drawn that discovery of the category 2 documents, which I do not consider to be relevant in any event, would also be unduly burdensome. It would be an enormous task for the plaintiff to access and peruse all documents, in his possession or procurement, covering a 70-year period, with a view to testing if they fall within the scope of category 2. The court considers that such an exercise could impose on the plaintiff significant, possibly prohibitive compliance costs.

29. The same cannot be said for discovery of the category 1 documents (particularly as limited in the manner proposed below). The IRA is an illegal and secret organisation. Of its nature, it is unlikely that such an organisation generates significant volumes of documentation. It is doubtful that the IRA produced and circulated to its members agendas, minutes of meetings, correspondence and other documentation common-place in lawful organisations. Even if such documents were generated and circulated, it is surely improbable that they were retained. Therefore, without in any way assuming the truth of the defendant's contentions, it is unlikely that there is in existence a large volume of documentation falling within the scope of category 1.

Conclusion on discovery application

84. With a view to limiting proportionately the burden of compliance, which may be placed on the plaintiff, the court orders discovery of the following documents:

Category 1.

- a) The earliest document evidencing the plaintiff's membership of the IRA and the latest document evidencing the plaintiff's membership of the IRA.
- b) The earliest document evidencing the plaintiff's membership of the IRA army council and the latest document evidencing the plaintiff's membership of the IRA army council.

Category 2 is refused.

85. I will hear argument from the parties in relation to the question of costs and any other matters arising on foot of this judgment on 25th March, 2022 at 11 am.