THE HIGH COURT

[2024] IEHC 436

Record No. 2022/4706P

BETWEEN

GERARD CRAUGHWELL

PLAINTIFF

AND

THE GOVERNMENT OF IRELAND, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT OF MR. JUSTICE CREGAN DELIVERED ON THE 8TH DAY OF JULY 2024

INTRODUCTION

1. The plaintiff alleges that the Government has entered into a secret agreement with the U.K. under which the Royal Air Force (R.A.F.) can patrol Irish airspace and intercept any aircraft which pose a threat to Ireland or the U.K. The Government refuses to confirm or deny the existence of this agreement and it has brought an application for the trial of a preliminary issue that this matter is not justiciable or amenable to judicial review. This judgment deals with that application.

2. This application by the defendants for a trial of a preliminary issue is brought pursuant to Order 25 rule 1 (and/or Order 34 rule 2) of the Rules of the Superior Courts.

3. The defendants in fact originally sought a trial of two preliminary issues. These were as follows:

1. *Is the exercise of the government's executive power in relation to the external scrutiny and external relations of the State justiciable and/or otherwise amenable to review by this court in the absence of any material facts being pleaded capable of establishing clear disregard of the Constitution?*
2. *Is the exercise of the government's executive power in relation to the external security and external relations of the State justiciable and/or otherwise amenable to review by this court in circumstances where the proceedings would require this court to review matters of external security falling within the scope of the executive power, confirmation or denial which could risk endangering security of the state and undermining the state's international relations?*

4. The first step in the application for the trial of a preliminary issue came on for hearing in the High Court. Having heard submissions on the matter, and having reserved his decision, Mr. Justice Mulcahy gave a written decision on 12th October, 2023. As a result of this decision and by agreement of the parties, the High Court directed the trial of one preliminary issue namely:

> *"Is the exercise of the government's executive powers in relation to the external security and external relations of the state justiciable and/or otherwise amenable to review by this court <u>on the basis of the facts as pleaded</u>?"* (emphasis added).

5. It is important to note that the matter which set down for the trial of the preliminary issue under Order 25 rule 1 were not the two questions sought by the defendants but rather one question only - i.e. the first question sought by the defendants as amended by agreement of the parties and the court. In particular, it should be noted that certain amendments were

made to the first question sought by the defendants and the phrase *"in the absence of any material facts being pleaded capable of establishing clear disregard of the Constitution"* in the defendant's original question 1 was replaced by the words *"on the basis of the facts as pleaded".*

6. It is clear therefore that the application before this Court is for the trial of this preliminary issue. However, as will be seen, there was a wide divergence of views on the part of the plaintiff and the defendants as to what are the "facts as pleaded". In particular the defendants submitted (i) that certain pleas of the plaintiff are not "facts", strictly speaking, but are inferences from facts and (ii) that certain other pleas of the plaintiff are not "facts" but are "mixed matters of fact and law".

7. This Court is therefore faced with a situation in which the defendants are not accepting the facts as pleaded by the plaintiff which, as the authorities show, is a clear precondition for the trial of preliminary issues.

8. The caselaw demonstrates that the defendants must accept the plaintiff's case as pleaded – even if only for the purposes of the trial of a preliminary issue – and the trial of a preliminary issue takes place in that context.

9. In order to understand the pleadings in this matter, and the defendants' submissions on this issue, it is necessary to set out the relevant pleadings in this case.

THE PLAINTIFF'S PLEADINGS

10. This case commenced by way of plenary summons on 12th September, 2022. A statement of claim was also delivered by the plaintiff on the same date.

11. The plaintiff is an independent member of Seanad Éireann and a citizen of Ireland. He previously served with both the Defence Forces in Ireland and with the British Army. He is also a former president of the Teachers Union of Ireland.

12. The first defendant is the Government of Ireland; the second defendant is Ireland and the third defendant is the Attorney General sued in his capacity as legal representative of the second defendant.

13. The fundamental plea in this case is set out in paragraph 14 of the statement of claim which provides as follows:

> *"Subsequent to the attacks in the United States of America on 11th September, 2001, the defendants and each of them by themself, their servants or agents (hereinafter referred to "the government") and the United Kingdom of Great Britain and Northern Ireland, its servants or agents, made an agreement ("the agreement") which allows, causes or permits UK military aircraft of the Royal Airforce ("the RAF") to enter Irish airspace. Pursuant to the agreement the RAF has permission to fly into Irish airspace and intercept and/or interdict aircraft that poses a threat to Ireland and/or the United Kingdom of Great Britain and Northern Ireland".*

14. Paragraph 16 pleads that this agreement, which permits the R.A.F. to enter Irish airspace to intercept and/or to interdict aircraft, contains provisions which are fundamentally incompatible with certain articles of the Constitution of Ireland.

15. In particular paragraph 18 of the statement of claim pleads that:

> *"Under Article 29.5.1 of the Constitution of Ireland: 'Every international agreement to which the State becomes a party shall be laid before Dáil Éireann".*

16. Paragraph 21 of the statement of claim pleads that:

> *"The agreement made between Ireland and the United Kingdom of Great Britain and Northern Ireland is <u>an international agreement</u> and it has not been laid before Dáil Éireann."* (e mphasis added).

17. At paragraph 22, it is pleaded that *"The failure to lay the agreement before Dáil Éireann amounts to <u>a deliberate disregard</u> by the government of the powers and duties*

conferred on it by the Constitution. Furthermore it is not within the competence of the government to free itself from the restraint placed on its executive power by Article 29.5.1 of the Constitution of Ireland". (emphasis added).

18. At paragraph 28 it is pleaded:

"The entering into of a secret agreement by the government with another sovereign state without the knowledge of the people of Ireland from whom all power derives is not in accordance with the Constitution and is an impermissible derogation of power contrary to the Constitution of Ireland". (emphasis added).

19. Another important plea is at paragraph 29 of the statement of claim wherein the plaintiff pleads as follows:

"By letter dated 17th August, 2022 the plaintiff instructed solicitors to write to the defendants seeking information about the agreement made between Ireland and the United Kingdom of Great Britain and Northern Ireland. The relevant information requested in the letter is reproduced herein.

1. We formally request that you confirm whether the Government of Ireland has entered into any agreement, accord, arrangement, assignment, exchange of letters, memorandum of understanding, protocol, service level agreement, understanding, etc., whether written or oral, of a formal or informal nature or any form whatsoever with the Government of the United Kingdom of Great Britain and Northern Ireland (and/or any of its armed or other services) which permits the United Kingdom's armed military aircraft to fly within Irish airspace to provide air policing and/or interdiction and/or interception of aircraft within Irish airspace.

2. It is our client's understanding that such an agreement exists between Ireland and the United Kingdom. Our client's belief is supported by a reply given by the Taoiseach. In a Dáil Éireann debate on Wednesday 16th November, 2005 (volume 610

No. 2) the Taoiseach replied to a question from Deputy Enda Kenny which asked inter alia "Would the RAF have to be called in from either Northern Ireland or Britain to intercept a hijacked aircraft?", the Taoiseach replied: 'On the first question, there is cooperation and a pre-agreed understanding on those matters and as Leader of the Opposition I can bring Deputy Kenny through that at some stage".

If the 'pre-agreed understanding' is different to the information sought at paragraph 1 herein, we call upon you to confirm that such an understanding is in place to provide our client with the details of the said arrangement.

3. Furthermore, in the event that there is such an agreement or arrangement or understanding etc., we ask you to provide a copy of the said agreement to this office within 14 days of this letter." [emphasis added).

20. The plaintiff, in his prayer for relief, claims various declarations that the said agreement is a breach of various Articles of the Constitution, and that it has not been put before the Dáil in breach of Article 29.5.1° of the Constitution.

21. In the running of the application before this Court, all parties focussed on the central issue in this case which was whether the alleged agreement, which was pleaded to be an international agreement by the plaintiff, was in breach of Article 29.5.1 of the Constitution which provides that *"Every international agreement to which the State becomes a party shall be laid before Dáil Éireann."*

22. When one boils down the plaintiff's pleaded claim to its essentials, it can be summarised as follows:

1. The Government has entered into an agreement with the United Kingdom which allows the R.A.F. to enter Irish airspace to intercept aircraft in Irish airspace which pose a threat to Ireland and/or the U.K.;

2. This is an agreement between two sovereign states and, as such, is an international agreement;
3. This international agreement has not been laid before Dáil Éireann as is required by Article 29.5.1°; therefore the government is acting in clear disregard of the Constitution.

THE DEFENDANT'S PLEADINGS

23. At Paragraphs 2 - 4 under the heading "Preliminary Objections" the defendants plead as follows:

> *"2. The exercise of the executive power of the State in relation to the external security and external relations of the State falls within the exclusive power of the first named defendant under Articles 28 and 29 of the Constitution of Ireland 1937.*
>
> 3. *The first named defendant is entitled to take such measures as may be necessary to ensure the security of the State and to exercise the external relations of the State within the limits of its powers under Articles 28 and 29 of the Constitution.*
>
> 4. *"Save in cases of clear disregard of the provisions of the Constitution, the exercise by the first named defendant of the executive power of the State in relation to the external security and external relations of the State is not justiciable and/or otherwise amenable to or appropriate for review by the courts. To the extent that the plaintiff invites the court to examine the exercise of these powers the defendants expressly reserves their rights to object to same on this basis."* (emphasis added).

24. At para. 9 of the defence it is pleaded: *"It is the policy of the first defendant that it will neither confirm nor deny matters relating to the external security and external relations*

of the State falling within its exclusive power in circumstances where such confirmation or denial would risk endangering such security and/or undermining the States international relations".

25. At para. 14 the defence pleads:

"As pleaded above:

1. *The first named defendant neither confirms nor denies matters relating to the exercise of its exclusive powers relating to the external security and external relations of the State, in circumstances where such confirmation or denial would risk endangering such security and/or undermining the states international relations.*
2. *Further, the first defendant is entitled to take such measures as may be necessary to ensure the external security of the State and to exercise the external relations of the State within the limits of its powers under Article 28 and 29 of the Constitution.* (emphasis added).

26. At para. 15 it is pleaded that "*No admissions are made in respect of the existence of any agreement or arrangement with the U.K. whether as alleged at para. 14 or at all and insofar as the plaintiff purports to rely on same the defendants require proof of same".*

27. The defendants also deny that the duty to lay an international agreement before Dáil Éireann under Articles 29.5.1° of the Constitution arose in this case and/or that the defendants acted in disregard of its powers and duties under the Constitution.

THE AFFIDAVIT EVIDENCE

(i) The defendants' evidence

28. The defendants' application is grounded upon the affidavit of Ms. Sonja Hyland, a Deputy Secretary General within the Department of Foreign Affairs.

29. At para. 15, she states that she believes these proceedings:

"Seek in essence to invite this court to review the most sensitive elements of the exercise by the Government of Ireland of its exclusive executive power of the State in relation to the external security and/or external relations of the State in a manner which the defendants consider to be impermissible under the Constitution."

30. She states at para. 20 that she can confirm that:

"It has long been the policy of the Government neither to confirm nor to deny matters relating to the external security and/or external relations of the State where such confirmation or denial would risk endangering external security and/or undermining the State's international relations."

31. Ms. Hyland says at para. 22 that the matters raised by the plaintiff in these proceedings go to the very heart of the executive power in relation to the external security and external relations of the state.

32. At para. 25, she states that the State faces an increasingly *"volatile international security environment in particular in the wake of Russia's invasion of Ukraine."*

33. She states at para. 26 that:

"Ireland's policy of miliary neutrality and military nonalignment means that there are no common or mutual defence arrangements in place which mitigate risks to Ireland's external security. In this context the potential for Ireland to engage in informal cooperation with its international partners otherwise than through common or mutual defence arrangements and similar international agreements takes on particular importance in the exercise of the State's executive power in relation to external security and external relations."

34. Ms. Hyland also states that Ireland is in receipt of significant amount of confidential information from the EU and, if classified information of this kind were liable to be subject to

review and/or disclosure by the court, it would create a risk that Ireland would be regarded as an unreliable partner.

35. At para. 34, Ms. Hyland states that the sole fact relied upon the plaintiff as the basis for his claim is a single reference in the course of Dáil debates in 2005 and that this single fact does not provide a basis in fact for the claims of the plaintiff in his statement of claim.

36. Ms. Hyland also states that it is the policy of the Minister for Foreign Affairs to seek to lay all international agreements before Dáil Éireann and she confirms that all international agreements that have entered into force for Ireland before 2020 have been laid before the Dáil. She also says that all international agreements to which the State is a party are published in the "*Irish Treaty"* series and that the "agreement" in question in this case is not so published.

37. She also states in her affidavit that under Article 102 of the United Nations Charter, every treaty or international agreement entered into by a member of the United Nations must be registered with the United Nations Secretariat and she confirms that no international agreement of the kind alleged by the plaintiff has been so registered.

38. Ms. Hyland states at para. 40 of her affidavit:

> *"While it is acknowledged that if the State entered into an international agreement in this field with a third state or third states, this would have to be laid before Dáil Éireann in accordance with Article 29.5.1 of the Constitution, no such requirement applies to measures taken from time to time by the government in the exclusive exercise of its exclusive policy making powers in the field of external security and external relations whether in the form of cooperation, shared understanding or otherwise."*

39. Thus, she says, the plaintiff has not pleaded any material facts which support its claim that the State has entered into an international agreement of the kind alleged.

40. She states that the exercise by the Government of its executive power in relation to external security and external relations is not justiciable or amenable to judicial review except where there is a clear disregard of its duties under the Constitution.

41. Ms. Sonja Hyland in her second affidavit states that the language used by the Taoiseach in the Dáil in 2005 – referring to "cooperation and a pre-agreed understanding:

> *"Is very general in nature and cannot be regarded as confirming that there was a legally binding international agreement in place of the kind that would be subject to the requirements of Article 29.5 of the Constitution as the plaintiff contends in these proceedings."*

42. It is an unusual feature of this case that the defendants refuse either to confirm or deny the existence of the alleged agreement.

(ii) <u>The plaintiff's evidence</u>

43. Mr. Craughwell, in his replying affidavit, at para. 13, states that it is significant that the defendants have failed to deny the existence of this alleged agreement.

44. Mr. Craughwell also avers to various conversations which he has had with English MPs wherein they raised the existence of this alleged agreement.

45. Mr. Craughwell also makes reference, in his affidavit, to an answer given by the U.K. Minister for Defence in the House of Commons on 7 November 2022 who, in response to a question in the House of Commons, (which asked the Secretary of State for Defence what his Department's policy was on U.K. military aircraft entering the airspace of the Republic of Ireland for operational purposes) replied:

> *"U.K. military aircraft do not enter the sovereign airspace of Ireland for operational purposes without the express prior agreement of the Irish Government. The RAF polices the U.K. flight information region (FIR) on behalf of NATO and international community and would only enter foreign national airspace when authorised to do so.*

Questions on sovereign airspace access and associated regulations are for individual nations to answers, therefore any questions on Irish airspace should be directed to the Irish Government."

LEGAL PRINCIPLES APPLICABLE TO SUCH APPLICATIONS.

46. Order 25 rule 1 deals with trials of point of law and provides as follows:

"Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the Judge who tries the cause at or after the trial, provided that by consent of the parties, or by order of the Court on the application of either party, the same may be set down for hearing and disposed of at any time before the trial".

47. Order 34 rule 2 provides:

"If it appear to the Court that there is in any cause or matter a question of law, which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, or before any reference is made to an arbitrator, the Court may make an order accordingly, and may direct such question of law to be raised for the opinion of the Court, either by special case or in such other manner as the Court may deem expedient, and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed."

48. Counsel for the defendants indicated to the Court that the application was being made under Order 25.

49. In *Kilty v. Hayden* [1969] I.R. 261 O'Dalaigh C.J. considered the terms of Order 25 and stated as follows:

"When Order 25 is contrasted with Order 36 it becomes clear that Order 25 is not providing for the separate trial of issues which are partly of fact and partly of law, but for the separate trial of a net point of law dissociated from issues of fact, that is to

say, the point of law must arise on the basis of the facts being as the opposing party in his pleadings alleges them to be." (emphasis added).

50. O'Dalaigh C.J. also stated:

"I am satisfied that the procedure laid down under Order 25, r. 1, corresponds to the old hearing on demurrer, and may not be availed of where the facts giving rise to the point of law are in dispute between the parties." (emphasis added).

51. As Lynch J. stated in *McCabe v. Ireland* [1999] 4 1 I.R. 151:

"A preliminary issue of law obviously cannot be tried in vacuo: it must be tried in the context of established or agreed facts. The facts relevant to the preliminary issue must not be in dispute, but they may be agreed for the purposes of the preliminary issue of law only without prejudice to the right to contest the facts if the actual determination of the preliminary issue should not dispose of the matter at issue. The facts must be agreed or the moving party must accept, for the purposes of the trial of the preliminary issue which he raises, the facts as alleged by the opposing party."

(Emphasis added.)

52. In *Tara Exploration and Development Company Ltd v. Minister for Industry and Commerce*, [1975] I.R. 242, Kenny J. dismissed the defendant's application for an order that certain questions of law be determined as preliminary issues on the basis that proposed questions could not be answered without reference to the relevant facts and these were still undetermined. This conclusion was upheld by the Supreme Court with O'Higgins C.J. commenting that '*O. 34 r.2 can only apply to questions of pure law where no evidence is needed and no further information is required. Where, as in the case before the court, the answers to the suggested questions of law were dependent on facts that it had not yet been ascertained, the procedure could not be utilised".*

53. In *Dempsey v. The Minister for Education and Science* [2006] IEHC 183 Laffoy J. refused to order a trial of preliminary issues, even though the defendants had accepted the facts pleaded in the statement of claim, because she was of the view that the pleas involved mixed questions of law and fact and the issues of law identified could not be determined as "stand alone" issues of law on the basis of assumed facts.

54. As Laffoy J. stated at page 14 of her judgment:

> *"The defendants say that, for the purposes of the trial of the preliminary issue, the facts alleged by the plaintiff in the statement of claim can be assumed to be true. I feel constrained to ask: what facts? If it is that the defendants have failed in their constitutional and statutory duties to make adequate and proper provision for the plaintiff's educational needs, in my view, that is a mixed question of fact and law, because when it falls to be determined it will involve measuring what the defendants have actually provided, which is a question of fact, against the standard of provision which the law requires of them, which is a matter of legal principle and interpretation. Alternatively, if it is that the defendants have failed to make adequate and proper provision for the plaintiff's educational needs without measuring the provision made against the required standard laid down in the Constitution or by statute, in my view, that is a meaningless basis for examining the allocation of resources issue. On that basis, I have come to the conclusion that the approach advocated by the defendants is conceptually flawed. Having regard to the other issues raised on the pleadings, the points of law outlined in the notice of motion are not susceptible of determination as discrete "stand alone" issues of law on the basis of assumed facts."*

55. In *Wicklow County Council v. O'Reilly* [2007] IEHC 71 Clarke J. (as he then was) refused to accede to an application for the trial of a preliminary issue because he was of the view that it would not be possible to decide the issue without going fully into the facts.

56. In *Nyembu v. The Refugee Appeals Tribunal and James Nicholson* [2007] IESC 25 Denham J. (as she then was) stated as follows at page 7 of her judgment:

> *"At the heart of this case is the circumstance that there are facts in dispute. There is no agreement on the facts – even for the determining of the preliminary issues. There is a wealth of precedent on such a situation"*

57. Denham J. then proceeded to refer to *Kilty v. Hayden, Tara Mines v. Minister for Industry and Commerce, and Others* and at paragraph 10 of her judgment she states:

> *"In this case there are contested facts which are relevant to the issues of law. There is no agreement on the facts. Nor are the facts conceded for the purpose of the preliminary issues. In such circumstances it is not appropriate, practical or convenient to have preliminary issues of law determined. It is well settled in law that where there are disputed facts an application for the hearing of a preliminary issue cannot succeed."*

58. In *Atlantic Shellfish Ltd v. Cork County Council* [2010] IEHC 294 Laffoy J. refused to order the trial of a preliminary issue in respect of the effect of a settlement agreement entered into by the parties because she was not satisfied that the issue identified was solely an issue of law which could be decided on the basis of the acceptance of facts pleaded by the plaintiff and that further evidence was required.

59. The principles which are to be applied in considering whether to order the trial of a preliminary issue were recently set out again by the Supreme Court in *Campion v. South Tipperary County Council* [2015] IESC 70. In that case McKechnie J. (giving the judgment

of the Court) urged caution in the use of preliminary issue procedure and then summarised the relevant principles to be applied. I have set out the first two of these below:

> *"1. <u>There cannot exist any dispute about the material facts as asserted by the relevant party: such can be agreed by the moving party or by him or her solely for the purposes of the application;</u>*
>
> *2. There must exist a question of law which is discreet and which can be distilled from the factual matrix as presented; there must result from such a process saving of time and cost, when the same is contrasted with any other suggested method by which the issues made be disposed of;"* (emphasis added).

60. There are of course concerns about adopting the procedure of trying a preliminary issue and, as was stated by Lord Evershed MR in *Windsor Refrigerated Company Ltd v. Branch Nominees Ltd* [1961] Ch. 375:

> *"The course which this matter has taken emphasises as clearly as any case in my experience has emphasised, the extreme unwisdom – save in very exceptional cases – of adopting this procedure of preliminary issues. My experience has taught me (and this case emphasises the teaching) that the shortest cuts so attempted inevitably turns out to be the longest way round."*

<u>ASSESSMENT</u>

61. This is an unusual application for the trial of a preliminary issue. It is clearly well-settled law that for a trial of a preliminary issue, the defendants must accept the facts as pleaded by the plaintiff - even if only for the purposes of the trial of the preliminary issue. In the present case however, the defendants do not accept the facts as pleaded by the plaintiff and instead seek to argue that one plea is not a fact but an inference from facts or that another plea is not a fact but a mixed question of law and fact**.**

62. In the present case, I am of the view that the plaintiff has pleaded the material facts of his case with certainty and clarity. There is no doubt what the question at issue between the parties is. The plaintiff has made three fundamental pleas:

(a) that there is an "agreement" between Ireland and the U.K. that the R.A.F. has been granted permission to intercept aircraft over the Irish airspace;

(b) that this agreement is an "international agreement";

(c) that the failure to lay this agreement before the Dáil is a clear breach of Article 29.5.1 of the Constitution.

63. In assessing the defendants' submissions, I will consider these three foundational pleas of the plaintiff and the defendants' submissions on each.

The first material fact – "the agreement"

64. The plaintiff's first foundational plea is made at paragraph 14 of the statement of claim (i.e. he pleads that there is an agreement between Ireland and the U.K. in relation to the R.A.F.) The defendants submit that this is not a pleaded fact but rather that it is an inference from the facts about what the Taoiseach stated in the Dáil (as set out in para. 29 of the statement of claim).

65. In my view, the defendants' submission that the plea at paragraph 14 is an inference from the facts of what the Taoiseach said is not correct. It is not an inference from facts; it is a legal characterisation of a set of facts. In the circumstances, the plea at paragraph 14 is a plea of law or a mixed plea of law and fact. If it is a question of law, (or a mixed question of law and fact) which depends upon further facts being established in court, then, if it is not accepted by the defendants, it is not suitable for a trial of a preliminary issue.

66. In my view, the plea at para. 29 (i.e. what the Taoiseach said in the Dáil) should be characterised as a piece of evidence to support this plea of an "agreement" in paragraph 14.

67. The defendants accept the facts as pleaded at paragraph 29 but do not accept the legal characterisations of those facts as an "agreement" as pleaded in paragraph 14. They may be right or wrong to do so in the final analysis. But for the purposes of a trial of a preliminary issue, they must accept the facts as pleaded by the plaintiff. If the defendants do not accept the plea that there is "an agreement" between Ireland and the U.K., then more evidence is required on whether the arrangement amounts to an "agreement" and the application for a trial of a preliminary issue must be refused.

68. The defendants submit that the plaintiff has not pleaded the alleged agreement with any great particularity. However that cannot be avoided in circumstances where the plaintiff pleads that it is a "secret agreement" and the defendants themselves refuse to admit or deny whether such an agreement is in existence. However there can be little doubt about the alleged agreement about which the plaintiff is pleading. It is the agreement set out in paragraph 14 of the Statement of Claim and the one referred to by An Taoiseach in the Dáil as set out in para. 29 of the statement of claim. .

69. Indeed the defendants have full knowledge of the alleged agreement. In these circumstances, the allegation that the plaintiff's pleadings lack particulars is without merit.

The second material fact – "an international agreement".

70. The second material fact pleaded by the plaintiff is that this agreement made between Ireland and the U.K. is an "international agreement".

71. However the defendants do not accept - even for the purposes of this application - that any arrangement of the sort entered into by Ireland and the U.K. amounts to an "international agreement" as pleaded by the plaintiff. The defendants plead that if there is any arrangement in place (which is not admitted), it does not amount to an "international agreement".

72. The defendants submit that the plea by the plaintiff that the agreement is an international agreement is not a plea of fact but is either a plea of law (or a mixed question of

law and fact). That may be so. However insofar as the plaintiff's plea is a plea of law (or a mixed plea of fact and law), and insofar as it is not accepted by the defendant, then it requires further evidence and again it is not suitable for the trial of a preliminary issue.

73. This Court is not in a position to assess at this time whether any purported agreement, which might be in existence, amounts to an "international agreement" or not, because this purported agreement has not been put before the Court by the defendants.

74. The defendants also submit that the plea that there is an "agreement" and that the agreement is an "international agreement" are merely "bare assertions". That may be true but in a sense all pleas are bare assertions. They are not evidence; they are asserted facts or asserted legal characterizations arising out of asserted facts.

75. In these circumstances, another foundational plea, as alleged by the plaintiff, is not accepted by the defendants for the purposes of this application and therefore the defendants' application for a trial of a preliminary issue must fail.

The third material fact as pleaded -an international agreement not laid before Dáil

76. The third relevant fact as pleaded by the plaintiff is that this international agreement has not been laid before the Dáil, as it should have been under Article 29.5.1° of the Constitution. The plaintiff has pleaded this at para. 21 of the statement of claim and has pleaded that this amounts to "deliberate disregard" of the Constitution.

77. The defendants accept that no agreement of this nature has been laid before Dáil Éireann but it does not admit that there is such an agreement or even if there is, they plead that it does not amount to an "international agreement".

78. There is therefore an agreement by the defendants that the arrangement in question has not been laid before Dáil Éireann. However this agreement about this fact, on its own, is clearly not sufficient to justify the trial of the preliminary issue in the absence of an acceptance by the defendants of the first two foundational pleas.

General comments

79. I am satisfied that the two foundational material facts as pleaded by the plaintiff i.e. that (i) there is an "agreement" between Ireland and England in relation to the R.A.F. and (ii) that this agreement amounts to an "international agreement" within the meaning of Article 29.5.1°, have been fully and properly pleaded by the plaintiff.

80. The defendants have refused to accept, even for the purposes of this application, the plaintiff's pleaded facts on these two foundational issues. In those circumstances there is no agreement between the parties on the material facts relevant to the trial of the preliminary point of law and in those circumstances the defendants' application for a trial of a preliminary issue must fail.

81. It is simply not possible in circumstances where the defendants do not accept that there is such an "agreement" and/or do not accept that such an agreement (if it exists) rises to the level of an "international agreement" (even for the purposes of the trial of the preliminary issue) to reach any concluded view on the preliminary issue.

82. I would also note that much of the defendants' submissions seem to be aimed at the proposition that the plaintiff's case was unstateable, or bound to fail. At times, it seemed to me that the defendants' application was an application under order 19 rule 28 to strike out proceedings on the grounds that they did not disclose a reasonable cause of action or were bound to fail. Such an application was not made, and, in my view, if it were made, it would not succeed. The plaintiff's case discloses a reasonable cause of action, and it is not "bound to fail".

83. The defendants also submitted that the preliminary issue <u>is</u> the state of the plaintiff's pleadings. But I do not accept this submission. In my view, the plaintiff has pleaded his case with clarity. It is clearly a stateable case and it is not bound to fail.

Even if the defendants had accepted the plaintiff's case as pleaded, is the matter justiciable? The question of "clear disregard"

84. The issue which the defendants seek to have tried as a preliminary issue is whether or not, on the basis of the facts as pleaded, the exercise of the government's executive power in relation to external security and external relations, in relation to this alleged agreement, is justiciable.

85. In deference to the submissions of counsel, and in case I am wrong on all of the above, I should proceed to express a view on the preliminary issue. If the defendants had accepted the plaintiff's pleadings as pleaded, (i.e. if they accepted that there was "an agreement" and if they accepted that it was an "international agreement" and that it was not laid before the Dáil in accordance with Article 29.5,) then, in my view, the issue of whether this amounted to a "clear disregard" of Article 29 is a justiciable issue and I would have answered the preliminary point in that way. That would have meant that the plenary trial would have proceeded and the plaintiff would have to prove (i) that there was an agreement (ii) that it was an "international agreement" and (iii) that there was "clear disregard" of the Article 29.5.1° of the Constitution.

86. An extensive amount of caselaw on this issue of "clear disregard" was opened to the Court.

87. In particular the parties opened *Crotty v. An Taoiseach* [1987] I.R. 713 and the judgments of Barrington J. in the High Court, and of Walsh J., Henchy J., Griffin J. and Hedderman J. in the Supreme Court.

88. Walsh J. at page 778 (whilst noting that the executive power of the State shall be exercised by or on the authority of the government under Article 28 s.2 of the Constitution) stated:

"Nevertheless the powers must be exercised in subordination to the applicable provisions of the Constitution. It is not within the competence of the Government, or indeed of the Oireachtas, to free themselves from the restraints of the Constitution or to transfer their powers to other bodies unless expressly empowered so to do by the Constitution. They are both creatures of the Constitution and are not empowered to act free from the restraints of the Constitution. To the judicial organ of government alone is given the power conclusively to decide if there has been a breach of constitutional restraints."

89. At page 779 of his judgment, Walsh J. in referring to *Buckley & Ors (Sinn Féin) v. The Attorney General* [1950] I.R. 67 also stated:

"It does not follow from that conclusion that the actions of the executive can never be reviewed by the Courts even in respect of matters which are on their face apparently within the exclusive domain of the Government. It is beyond dispute and well settled in many cases that one of the functions of the Courts is to uphold the Constitution. That includes restraining the Government from freeing themselves or purporting to free themselves from the restraints of the Constitution."

90. Likewise Henchy J. in the same decision at page 786 stated:

"I am unable to accept the submission that the powers of the Government in the conduct of foreign policy are not amenable to control by the Courts. It is true that Art. 29.4.1 of the Constitution provides that "the executive power of the State in or in connection with its external relations shall, in accordance with Article 28 of this Constitution, be exercised by or on the authority of the Government". However, when one turns to Art. 28 one finds that Art. 28.2 clarifies the position by declaring that "the executive power of the State shall, subject to the provisions of this Constitution, be exercised by or on the authority of the Government". (Emphasis

added). It follows, therefore, that in the conduct of the State's external relations, as in the exercise of the executive power in other respects, the Government is not immune from judicial control if it acts in a manner or for a purpose which is inconsistent with the Constitution. Such control is necessary to give effect to the limiting words 'subject to the provisions of this Constitution'."

91. Griffin J., at page 793 of the decision in *Crotty,* also states as follows:

"The power of the Court to interfere with the exercise by the Government of the executive power of the State was considered by this Court in Boland v. An Taoiseach [1974] I.R. 338. FitzGerald C.J., having referred to the statement of O'Byrne J. in Buckley & Ors (Sinn Fein) v. The Attorney General [1950] IR 67 and to the separation of the executive, legislative and judicial powers of government in Article 6 of the Constitution, said at p. 362:-

> *'Consequently, in my opinion, the Courts have no power, either express or implied, to supervise or interfere with the exercise by the Government of its executive functions, unless the circumstances are such as to amount to a clear disregard by the Government of the powers and duties conferred upon it by the Constitution.'"* (emphasis added.)

92. It is clear from the *Crotty* case (and indeed from many of the other cases referred to in the legal submissions) that the courts permit the Government a large measure of discretion in this area. Nevertheless, as Henchy J. stated in *Crotty*, in the conduct of the State's external relations, the Government is not immune from judicial control, if it acts in a manner, or for a purpose, which is inconsistent with the Constitution. This principle has already been clearly enunciated by the courts. Later decisions refine this principle and elaborate on it, but the central principle is nevertheless intact.

93. It is specifically pleaded at paragraph 22 of the statement of claim by the plaintiff in this case that:

> *"The failure to lay the agreement before Dail Eireann amounts to a deliberate disregard by the government of the powers and duties conferred on it by the Constitution. Furthermore it is not within the competence of the government to free itself from the restraint placed on its executive power by Article 29.5.1 of the Constitution of Ireland"*.

94. The defendants accept that a plea of "deliberate disregard" is, in substance, a plea of "clear disregard".

95. The defendants made lengthy submissions on a series of cases dealing with judicial review of executive action. The fundamental thrust of these submissions was that the decisions have indicated that the courts will only intervene in cases of "clear disregard" of the Constitution by the Government if a plaintiff's fundamental personal rights are not affected, but the courts will use a lower standard to intervene if a plaintiff's fundamental personal rights are infringed. However it is common case in these proceedings that the plaintiff's constitutional rights are not infringed and therefore "clear disregard" is the appropriate standard.

96. It was submitted by the defendants that the exercise of the Government's executive power in relation to the external security and external relations of the State is not justiciable - unless there is clear disregard of the Constitution. However one could look at that submission another way and say that if the exercise of the Government's executive power in relation to the external security shows a clear disregard of the Constitution, then it is justiciable. In other words, once a plaintiff pleads, as in this case, that (i) there is an agreement and (ii) it is an international agreement and (iii) it has not been laid before the Dáil as is required by Article 29.5.1°, then it raises the issue as to whether the actions of the Government amounts to a

"clear disregard" of the Constitutional provisions. In such a case, the matter is justiciable and the Courts have a duty under the Constitution to hear and determine such issues.

97. The defendants submitted that what the Court has to consider in this application is whether the plaintiff has pleaded enough to satisfy that court that there "may be" a case about clear disregard – without actually deciding whether there is "clear disregard" in this case or not. In my view, the statement of claim is sufficiently pleaded to satisfy me that there may be a case of "clear disregard" of the Constitution. I cannot answer the question as to whether it does amount to "clear disregard" – that is a matter for the plenary trial. If a court at plenary hearing were to hold that the alleged "agreement" was "an agreement" and that it was an "international agreement", it would then have to consider whether the failure to place the agreement before the Dáil amounts to a "clear disregard" of the Constitution or not.

98. However I do not need to decide any of these matters in respect of this case – and I do not do so - as I cannot do so in the absence of the agreement by the defendants to the facts as pleaded by the defendants.

CONSIDERATION OF THIS PRELIMINARY ISSUE BY THIS COURT

99. One other issue requires comment and that is whether this Court can come to this conclusion, given that the High Court directed that this application for a trial of a preliminary issue should proceed. It is clear that the High Court (Mulcahy J.) made an order on 16th November, 2023 directing the trial of a preliminary issue pursuant to Order 25 rule 1 of the Superior Courts.

100. However this does not mean that this court cannot consider afresh whether a trial of a preliminary issue is possible based on further consideration of the matter. In this regard I note that in *L.M. v. Commissioner of An Garda Siochána* [2015] 2 I.R. 45 O'Donnell J. (as he then was) stated at para. 36:

"However, I also consider that a court is entitled, on the hearing of the preliminary issue, to consider if it is an appropriate case for determination by this procedure. If, for example, the court proceeded to hear and seek to determine the preliminary issue after a full and elaborate argument, it would, as I conceive it, still be open to the court to conclude that in the light of the arguments and the matters advanced, that it was not possible to give the sort of clear and unequivocal answer to the issue which would dispose of the case or any issues in the case. Therefore, the case should proceed to trial to have issues of law determined in the concrete and precise circumstances of an individual case. .... In my view a court retains power to refuse to determine a preliminary issue, if after careful analysis, it becomes apparent that some aspect of the issue was heavily fact-dependent, or that a possible outcome would be so contingent or qualified as to require almost the form of advisory opinion"

101. O'Donnell J. also stated at para. 44 of his judgment:

"The combined effect of the importance and complexity of the legal issue raised in these cases, the procedural inadequacies and confusions, the lack of factual and legal precision even after a number of years, the unlikelihood that even the bluntest answer will resolve all issues in such cases, and the possibility, at least, that the Court might not be able to offer more than a highly qualified, contingent or abstract answer, all lead me to the conclusion that the determination of the preliminary issue in these cases is an inadequate and inappropriate vehicle for the determination of the important issues raised."

102. Likewise, in the present case, I am satisfied, after three days of hearings on the matter, that it is not possible to give the sort of clear and unequivocal answer to the issue which would dispose of the case or any of the issues in the case.

CONCLUSION

103. I am of the view, therefore, that this Court, in this application, must refuse to consider the preliminary issue of law raised by the defendants because (i) the defendants have not accepted the facts as pleaded by the plaintiffs (ii) because some of the pleas are either pleas of law and/or mixed pleas of law and fact and (iii) because evidence is required before a court could come to a conclusion on the relevant matters pleaded by the plaintiff.

104. In the circumstances, I am of the view that the defendants' application for the trial of a preliminary issue must be refused.