COURT OF APPEAL

CIVIL

[approved]

[no redaction needed]

Neutral Citation Number [2026] IECA 48

[2019 No.7009 P]

[2025 No. 159]

The President

Binchy J

O'Moore J

BETWEEN

JAMES GUERIN

PLAINTIFF/RESPONDENT

AND

GEMMA O'DOHERTY

DEFENDANT/APPELLANT

JUDGMENT of Ms Justice Costello delivered on the 26th day of March 2026

Introduction

1. The plaintiff/respondent brought defamation proceedings against the defendant/appellant in respect of certain online and print publications. In this judgment I shall refer to them as the plaintiff and the defendant. The defendant admits she published the publications in July 2019. The case was heard by a judge and jury, commencing on 21st November 2023. On 28th November 2023, the jury was unable to agree on a verdict and a retrial was directed.

2. The defendant issued a motion on 6th December 2024 seeking an order pursuant to O.19, r.28 of the Rules of the Superior Courts and/or the inherent jurisdiction of the Court

striking out the proceedings *"on the grounds that they are malicious, vexatious, frivolous, based on fraud, perjury and deception, are a grave attack on press freedom, have no cause of action and are bound to fail."*

The motion was dismissed and the defendant appealed. The appeal was heard on 16th February 2026. This is my judgment in respect of the appeal.

The Striking out of Proceedings Prior to a Full Trial

3. Before considering the facts of this case, and the judgment under appeal, it is useful to consider the context in which the application is to be considered.

4. In *Scotchstone Capital Fund Ltd v Ireland* [2022] IECA 23, the Court of Appeal (Donnelly, Faherty, Ní Raifeartaigh JJ), identified the then relevant principles as being:

> *"(a) An application for a strike out of a plaintiff's claim on the basis of the inherent jurisdiction is not a substitute for a summary disposal of a case;*
>
> *(b) The jurisdiction exists, not to prevent hardship to a defendant from defending a case, but to prevent against an abuse of process of the court by the plaintiff, e.g. causing a manifest injustice to the defendant in being asked to defend a case which is bound to fail;*
>
> *(c) The burden of proof is on the defendant;*
>
> *(d) There is a degree of overlap between bound to fail jurisprudence and cases which are held to be frivolous and vexatious. However, the latter are cases which may have a reasonable chance of success but would confer no tangible benefit on a plaintiff or are taken for collateral or improper motives or where a plaintiff is seeking to avail of scarce resources of the courts to hear a claim which has no prospect of success.*
>
> *(e) The standard of proof is on the defendant/respondent to show that the claim is bound to fail or frivolous or vexatious;*

(f) Bound to fail may be described inter alia, as devoid of merit or a claim that clearly cannot succeed;

(g) Frivolous and vexatious must be understood in their legal context as claims which are, inter alia, futile, misconceived, hopeless;

(h) The threshold for the plaintiff successfully to defend such a motion is not a prima facie case but a stateable case;

(i) It is a jurisdiction only to be used sparingly, in clear cut cases, and where there is no basis in law or in fact for the case to succeed;

(j) The court must accept that the facts as pleaded by the plaintiff in considering whether an Order pursuant to O.19, r.28 may be made, but in the exercise of its inherent jurisdiction the court can to some extent look at and assess the factual basis of the plaintiff's claim;

(k) Where the legal or documentary issues are clear cut it may be safe for a court to reach a conclusion on a motion to dismiss;

(l) Even where a plaintiff makes a large number of points, each clearly unstateable, it may be still safe to dismiss; and

(m) In some cases, even if the factual disputes are clear cut or may be easily resolved, the legal issues or questions concerning the proper interpretation of documentation may be so complex that they are unsuited to resolution within the confines of a motion to dismiss."

5. This judgment was delivered on 31st January 2022 and refers to the two strands of case law which then applied: applications under O. 19, r. 28 (as it then stood) and applications under the inherent jurisdiction of the court. The Rules of the Superior Courts were amended on 22nd September 2023. Rule 28 now provides:

"*(1) The Court may, on an application by motion on notice, strike out any claim or part of a claim which:*

(i) *discloses no reasonable cause of action, or*

(ii) *amounts to an abuse of the process of the Court, or*

(iii) *is bound to fail, or*

(iv) *has no reasonable chance of succeeding.*

. . .

(3) The Court may, in considering an application under sub-rule (1). . . have regard to the pleadings and, if appropriate, to evidence in any affidavit filed in support of, or in opposition to, the application."

6. A number of points are worth highlighting. Firstly, the rule no longer employs the terms "*frivolous or vexatious*". These somewhat archaic words are replaced by the clearer description of the proceedings as disclosing no reasonable cause of action or amounting to an abuse of the process of the court or as being bound to fail or having no reasonable chance of succeeding. Secondly, the distinction that formerly applied between applications brought under O. 19, r. 28, on the one hand, and the inherent jurisdiction of the court, on the other hand, with regard to the consideration of evidence, has been done away with. The court is now given an express discretion to consider evidence in any affidavit filed in support of, or in opposition to the application brought under the Rules of the Superior Courts, "*if appropriate"*. The court is also entitled- as was always the case- to "*have regard to the pleadings"*

7. The jurisdiction to dismiss proceedings pursuant to O. 19, r. 28, as amended, was addressed by this Court in *Meehan v Ireland* [2025] IECA 59. The court noted that under the new rule, the court has jurisdiction to strike out a claim (or part of a claim) that is bound to fail or has no reasonable prospect of success. At para. 60, Allen J held:

"*Since the substitution of the new O. 19, r. 28 the jurisdiction to deal with a claim which is said to be an abuse of process is to be found in that rule. As Simons J. observed in O'Malley, the new rule reflects the pre-amendment jurisprudence. The new rule is expressed in terms of four alternatives. With the caveat – I suppose I should say – that the point was not argued, I see no difference between a claim which discloses no reasonable cause of action, or is bound to fail, or has no reasonable chance of succeeding. The foundation of the inherent jurisdiction to dismiss such claims in limine was the jurisdiction of the court to protect its process from abuse. That jurisdiction is now to be found in the new O. 19, rule 28. It is long and well established that it is an abuse of process to pursue a claim which is bound to fail; which a claim which discloses no reasonable cause of action is bound to do*."

8. Allen J then identified the judgment of Clarke J (as he then was) in *Keohane v Hynes* [2014] IESC 66, as setting out the clearest exposition explaining when the court may, and the limits of the court's entitlement to, engage with the facts of a given case when dealing with an application to dismiss proceedings on the basis that they are bound to fail or are an abuse of process. Allen J quotes Clarke J:

"*6.2. . . the extent to which it is appropriate for the Court to assess the evidence and the facts on a motion to dismiss as being bound to fail is extremely limited.*

. . .

6.5 . . . An application to dismiss as being bound to fail is not a means for inviting the court to resolve issues on a summary basis.

. . .

6.6 …the jurisdiction is to be sparingly exercised and only adopted when it is clear that the proceedings are bound to fail rather than where the plaintiff's case is very

weak or where it is sought to have an early determination on some point of fact or law.

. . .

6.7 …. Where there is evidence placed before the court on affidavit on behalf of a plaintiff which, if accepted at trial, might arguably lead to the plaintiff succeeding, then that is an end of the matter. But it does not necessarily follow that a plaintiff even has to put evidence of that type before the court. In Lopes, I observed at para 2.5:

> *'In order to defeat a suggestion that a claim is bound to fail on the facts, all that a plaintiff needs to do is to put forward a credible basis for suggesting that it may, at trial, be possible to establish the facts which are asserted and which are necessary for success in the proceedings. Any assessment of the credibility of such an assertion has to be made in the context of the undoubted fact, as pointed out by McCarthy J. in Sun Fat Chan (at p. 428), that experience has shown that cases which go to trial often take unusual turns on the facts which might not have been anticipated in advance.'*

I commented to similar effect in Salthill Properties at para 3.15:

> *'...it seems to me that I should assess the factual allegations ..., not on the basis of whether those parties have shown that they have evidence which, if accepted, would lead, arguably, to success in the proceedings but rather whether [the applicants] have established that it is impossible that any such evidence will be produced at trial.'*

6.8 What the Court can analyse is whether a plaintiff's factual allegation amounts to no more than a mere assertion, for which no evidence or no credible basis for believing that there could be any evidence, is put forward.

. . .

6.10 . . . [I]t is an abuse of process to maintain a claim based on a factual assertion in circumstances where there is no evidence available for that assertion and, importantly, where there is no reasonable basis for believing that evidence could become available at the trial to substantiate the relevant assertion. However, the bringing of a claim based on a factual assertion for which there is or may be evidence (even if the defendant can point to many reasons why it might be argued that a successful challenge could be mounted to the credibility of the evidence concerned) is not an abuse of process. It is for that reason that a court cannot properly engage with the credibility of evidence on a motion to dismiss as being bound to fail and it is for that reason that the very significant limitations which I have sought to identify exist in relation to the extent to which a court can properly engage with the facts on such an application."

The emphasis on the degree to which the court is constrained in engaging with the facts necessary to establish a plaintiff's claim is particularly relevant to this appeal.

The Factual Background

9. Veronica Guerin was a well-known crime journalist who was murdered in June 1996. She was survived by two brothers, the plaintiff and Mr Martin Guerin. The plaintiff is a local councillor on Fingal County Council. His brother, Mr Martin Guerin, was convicted of possession of child pornography on 11th July 2019 in the Circuit Court.

10. The defendant is a journalist[1], and she publishes a blog and edits and publishes a publication known as '*The Irish Light*' paper. She says that it has a large number of

[1] There is a dispute between the parties as to whether the defendant is currently a journalist. For the purposes of this judgment, I am treating her as such, but I am making no finding one way or the other.

readers/viewers and that her paper has a wide circulation. She publishes written and video material online and in hard copy. She says that she has a track record of uncovering child sexual abuse in relation to a school in Dublin and she has interest in uncovering the identity of the murderer(s) of Veronica Guerin.

11. On 11th July 2019, the day Mr Martin Guerin was convicted in the Circuit Court, the defendant published on X the following words:

> "*Paedophile brother of journalist Veronica Guerin, murdered with the involvement of Gardai, has been found guilty of possession of hundreds of child sexual abuse images. Case takes 5 years to get to court. Sentencing adjourned until October. Granted bail of €100. Walks from court.*"

A similar publication was posted on her Facebook account, and on 12th July 2019, she posted a video on www.gemmaodoherty.com which reads as follows:

> "*We say, this week for example, how the brother of Veronica Guerin was found with large quantities of child sexual abuse images, and of course he walked from court. Check out who the judge was did she have Fianna Fáil connections? Veronica Guerin's family big Fianna Fáilers, just check it all out, this man walked from court, he will be sentenced allegedly, allegedly he will be sentenced in a few months' time, that's no good, is he out abusing children now? Is he? So, the power paedophiles walk time and time again in this country.*"

12. The plaintiff maintains that he is one of the class of persons identified as a paedophile in the tweet and the other publications, as he is a brother of Veronica Guerin. He says that the publications are defamatory of him. The defendant denies this and insists that it was clear that the publications related to Martin Guerin and not to the plaintiff.

13. The case went to trial and the jury failed to agree. The High Court has directed a retrial of the case.

14. After the jury failed to reach a verdict, on 28th November 2023, the defendant published a high volume of social media posts concerning the plaintiff and his legal representatives. On 14th December 2023, the case was mentioned to O'Connor J (the trial judge and the judge in charge of the Jury List) due to the nature of these post-trial publications. The plaintiff sought an injunction directing the defendant to remove the publications complained of by the plaintiff and an order restraining her from maintaining, repeating or publishing through any medium of communication any posts which assert or imply that any member of the plaintiff's legal team have told lies or committed crimes in relation to the proceedings, or photographs or images of any or all members of the plaintiff's legal team. Most unusually, the High Court granted the reliefs sought in respect of the plaintiff's legal representatives and permitted the plaintiff to amend his pleadings to plead further defamation based on the material published by the defendant between November 2023 and January 2024.

15. The amended statement of claim was delivered on 12th February 2024, and the defendant delivered a defence and counterclaim on 24th April 2024. In her counterclaim, the defendant seeks damages for defamation against the plaintiff. She asserts that the plaintiff has "*falsely accused [her] of seeking to and intending to cause hurt by raising questions about the murder of his sister*", that she was behaving in a *"poisonous way"* by asking questions about this, that allegations of State complicity in the murder of Veronica Guerin were *"untruthful and unfounded*" and that the plaintiff was only making the allegations to seek *"cheap publicity"*. She pleads that the plaintiff inferred - in the course of these proceedings - that she was involved in a plot to have his life shortened and to burgle his property. She pleads that he has deliberately misconstrued commentary by her about his paedophile brother, that he has spent "*five years claiming that the Defendant is a dishonest person, would seek to mislead and lie to her large audience*". She asserts that the statements are false and that the

plaintiff made them with actual malice and ill-will and that they constitute defamation. She seeks aggravated and exemplary damages.

16. The defendant was legally represented up to and including the trial in November 2023. Her solicitors applied for a declaration that they ceased to be the solicitors acting on her behalf in the proceedings with effect from 23rd January 2024. Since then, the defendant has represented herself in these proceedings. The proceedings have been adjourned since then in the Jury List of the High Court. They await the outcome of this appeal.

17. On 24th June 2024, the defendant's motion to strike out the entire claim was listed for hearing before Coffey J in the Common Law List. The defendant withdrew the motion at first calling, and it was struck out with costs to the plaintiff. On 27th January 2025, the defendant's motion seeking the recusal of a judge was listed in the Common Law Motion List. There was no appearance by the defendant at first or second calling and Coffey J struck out the motion. On 6th December 2024, the defendant issued a further motion seeking the striking out of the proceedings. This was ultimately heard by Phelan J on 5th March 2025. The application was dismissed by the High Court in a written judgment delivered on 12th March 2025.

The Judgment of the High Court

18. Having set out the nature of the case and the history of the proceedings, Phelan J addressed the principles applicable to applications to strike out proceedings, either pursuant to O. 19, r. 28, and/or the inherent jurisdiction of the court, at paras. 33 to 38 of her judgment. She summarised the position at paras. 39 and 40 as follows:

> "*39. It follows… that the court hearing a strike out application may, to a limited extent, consider the underlying merits of the case. If it can be established that there is no credible basis for suggesting that the facts are as asserted, and that the*

proceedings are bound to fail on the merits, then the proceedings can be struck out pursuant to the amended rule.

40. Accordingly, to be successful on this application the Defendant must persuade me that the case against her, discloses no reasonable cause of action, or amounts to an abuse of the process of the Court, or is bound to fail, or has no reasonable chance of succeeding."

19. Phelan J noted that the proceedings are in defamation, and she considered the decision of the Court of Appeal in *Gilchrist v Sunday Newspapers & Ors* [2017] IECA 190, [2017] 2 IR 701. Finlay Geoghegan J, speaking for the court, acknowledged that the constitutional right of access to the courts in vindication of a right to a good name by pursuing defamation proceedings is not absolute and may be controlled by the courts in reliance upon its inherent jurisdiction to strike out or stay proceedings which constitute an abuse of process. Phelan J noted that in those circumstances, the core issue was whether, in accordance with the applicable principles, it would be an abuse of process for a plaintiff to pursue a claim for defamation, where, as a matter of probability, if he succeeds, he will obtain some benefit, but where the probable benefits appear disproportionate to the costs for the parties of litigating the claim and the impact on court resources.

20. Phelan J then noted the conclusion of Finlay Geoghegan J and, at para. 44 of her judgment, held:

"*Accordingly, [Finlay Geoghegan J] found that the jurisdiction of the Irish courts to strike out proceedings as an abuse of power was limited to cases, not otherwise frivolous or vexatious or bound to fail, which cannot provide a tangible benefit to the Plaintiff. She recognised that a finding that a plaintiff had been defamed, even without a substantial or any award in damages, could constitute a tangible benefit sufficient to resist proceedings being struck out as an abuse of process."*

Phelan J concluded that she must be satisfied that the instant proceedings disclosed no cause of action and/or are bound to fail, and that a strike out application will not be appropriate where the issues of law raised are not straightforward. She concluded that the burden on a defendant in moving a strike out application is a high one and the jurisdiction must be exercised sparingly, with due regard to the constitutionally protected right of access to the courts, and, in defamation proceedings, to the constitutional protection afforded a person's good name.

21. At paras. 47 to 67, she applied these principles to the facts and arguments before her. The defendant argued *"that it was obvious that in her reports, she was not referring to the Plaintiff but to a third party and that no-one was misled into believing that it was the Plaintiff".* Phelan J held that this was a contention in dispute, and it was *"clearly a matter for evidence and which properly falls to be determined at plenary hearing".*

22. The defendant argued that her publications were protected by absolute privilege as provided for in s. 17 of the Defamation Act 2009. She contended that this provided her a full defence to the claim. Her publications "*represent a fair, accurate and truthful account of proceedings publicly heard in a Court established by law and exercising judicial authority within the State",* and thus, were absolutely privileged.

23. The High Court noted that the plaintiff did not accept, as a matter of either law or fact, that the publications were privileged, pursuant to s. 17 of the Act. At para. 54, the trial judge held:

> "*54 . . . It is appropriate to stress that the privilege conferred by s. 17(2)(i) in relation to court reporting applies only in respect of 'fair and accurate report of proceedings publicly heard before, or decision made public by, any court' and in consequence privilege does not apply automatically and without enquiry as to the fairness or accuracy of the report.*

> . . .
>
> *Accordingly, an issue arises for determination upon evidence properly adduced as to whether the reports were fair and accurate."*

The trial judge said that this was a matter for a jury to decide, and it was not a question that she could or should decide on the papers grounding the application. She held that this was particularly so in circumstances where a jury deliberating on the same issues had already failed to agree a verdict. She said:

> "*Indeed, the fact of previous jury disagreement, in and of itself, is capable of being dispositive of this application unless I can be persuaded that the proceedings are otherwise subject to a strike out jurisdiction because, for example, they constitute an abuse of process or are bound to fail/have no reasonable prospect of success by reason of some intervening event."*

24. The High Court concluded that a stateable claim in defamation had been pleaded and the cause of action was plainly disclosed. Whether the defendant had in fact been guilty of defamation was a matter for a jury, properly charged, and hearing all admissible evidence to determine. Phelan J held that no sufficient basis had been advanced to support a conclusion that the proceedings were bound to fail or had no reasonable prospect of success. She observed that:

> *"[T]he fact that the first hearing ended in a hung jury, the matter having been permitted to go to the jury by the trial judge, suggests otherwise.*
>
> . . .
>
> *In view of the fact that the previous jury did not dismiss the claim against the Defendant, I cannot conclude that the proceedings are bound to fail or have no reasonable prospect of success…"*

Applying *Gilchrist,* she was satisfied that there was *"nothing in the Plaintiff's proceedings"* which amounted to an abuse of the process of the court, and she held that there was no evidence that the proceedings were brought for an improper purpose, that the defendant's claims were not substantiated and were *"no more than bare assertion".* She held that bare assertions of this kind *"could never be enough to justify the exercise of a strike out power".*

25. Phelan J ruled that previous decisions of the High Court in the course of the proceedings, as set out in the judgments of Humphreys J and O'Connor J, could not be rehashed and the complaints the subject of those judgments could not justify the strike out of the plaintiff's proceedings. Finally, she noted that the defendant had not sought to address the additional claims in defamation at all on the application, and that in itself posed an insuperable problem.

26. Phelan J therefore concluded that the defendant had set out no legal or factual basis upon which she was entitled to succeed on the motion, and accordingly, she refused the application to strike out the proceedings.

The Appeal

27. Before considering the issues presenting in this appeal, it is useful to set out what this appeal is not about, because so much of the defendant's submissions and complaints to this Court were addressed to matters which either did not arise on the appeal or were irrelevant to the question whether the High Court erred in refusing to strike out the proceedings.

28. The question is whether the plaintiff's proceedings disclose no reasonable cause of action, amount to an abuse of process of the court, are bound to fail, or have no reasonable chance of succeeding. It is not about *"silencing"* the defendant or any journalist. Any person, including journalists, may properly be sued in defamation. The fact of being a journalist does not render a person immune from suit. The appeal is not about *"character assassination"* of

the *defendant.* Neither is it about claims the defendant may have against the plaintiff or anyone else, including the plaintiff's legal representatives. It is not about her *"right"* to *"investigate"* the plaintiff, nor does it concern *"an attack"* on press freedom. Specifically, it is not about the SLAPP Directive (EU Directive 2024/1069 of the European Parliament and of the Council of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings). The appeal from the judgment of Phelan J is not about any possible infringement of the defendant's right to privacy, and in particular, whether her address has been wrongfully put into the public domain by the plaintiff's application for an order deeming service of the proceedings good and for substituted service. Neither is it about any actions of the defendant or any speeches of the defendant which she had made or engaged in, in the context of the presidential election campaign in 2018. The proceedings concern publications issued by her in 2019 and later in 2023/early 2024. It is not about whether the allegations made by the plaintiff during the course of the proceedings *"defame"* the defendant. That is a matter encompassed in her counterclaim, not the plaintiff's claims against her. The motion does not engage the defendant's entitlement to the presumption of innocence, as she is not the subject of any criminal charge in these proceedings, so the suggestion that the proceedings somehow deprive her of the "presumption of innocence" is entirely misconceived.

29. This appeal is focused on the question of whether or not, pursuant to O. 19, r. 28, the High Court erred in failing to strike out the proceedings, and whether this Court ought to overturn the judgment of the High Court and strike out the proceedings. If the defendant fails in this appeal, she will not be deprived of the opportunity to present her arguments and to have a court decide on the issues in dispute between the parties. In that event the case will go to trial before a judge and jury, and the defendant will have the opportunity to present her evidence and arguments to the court and matters in issue will be decided by the jury.

The Grounds of Appeal

30. There are eight grounds of appeal pleaded in the notice of appeal:

(i) That the trial judge erred in law by failing to uphold the defendant's right to have the action struck out on the grounds that it is malicious, vexatious and abuse of court process and has no cause of action.

(ii) The publications of July 2019 are protected by absolute privilege by reason of s. 17 of the Defamation Act 2009 and the High Court erred in failing to rule that the publications were entitled to the benefit of absolute privilege.

(iii) The publications of July 2019 were published in the course of and for the purpose of the discussion of a subject of public interest and public benefit and the High Court erred in law by failing to hold that the publications were protected under s. 26 of the Defamation Act 2009.

(iv) The High Court erred in failing to hold that the proceedings are an abuse, in that the plaintiff, a politician, by these proceedings, is attempting to silence the defendant from investigating corruption in public office; the proceedings represented a targeted and strategic legal attack on public participation by the defendant contrary to the SLAPP Directive; the proceedings violate the defendant's rights under Article 40.6.1° of the Constitution and Article 11 of the Charter of Fundamental Rights of the European Union and Article 10 of the European Convention on Human Rights.

(v) The amended claims relating to the publications in 2023/2024 and the complaints of the plaintiff's lawyers following the conclusion of the trial in November 2023 have been widely published and the High Court erred in not striking out the proceedings on the basis that it will not be possible for the defendant to receive a fair trial.

(vi) The trial judge was guilty of objective bias, wrongfully predetermined the substantive matter in the case, wrongfully refused to examine the evidence presented by the defendant and made unfair comments about the defendant.

(vii) The defendant believes that a third party is funding the plaintiff and therefore the proceedings ought to have been dismissed on the basis that they offend the rules against champerty and maintenance.

(viii) The High Court erred in deciding that it was for the jury to decide if the court report of July 2019 was privileged or not.

31. In her written submissions filed in support of the appeal, the defendant identified five main issues arising:

(i) Whether the publications of July 2019 were protected by absolute privilege under s. 17 of the Defamation Act 2009 and/or by the public interest defence under s. 26, such that the claim is unsustainable in law.

(ii) Whether, having regard to the plaintiff's conduct of the litigation, the proceedings amount to a Strategic Lawsuit Against Public Participation (SLAPP) and an abuse of process that should be struck out.

(iii) Whether the High Court erred in concluding that the tests in O. 19, r. 28 were not met because a stateable cause of action had been pleaded and whether the High Court erred in applying the rule.

(iv) Whether the appellant can receive a fair trial so that the continuation of the proceedings is incompatible with constitutional fair rights and Article 6 of the European Convention on Human Rights.

(v) Whether the involvement of any third-party funding or improper purpose would further support a finding of maintenance/champerty and abuse of process.

32. I will consider each of these arguments advanced by the defendant, but prior to embarking on this task, it is important to emphasise that this appeal is not a rehearing of the application which was made to the High Court. The appeal is by way of review. This Court is required to afford significant deference to the decision of the High Court. However, if an appellate court detects a clear error in the manner of the approach of the High Court judge, it ought to intervene. Further, even absent any such error, the court may nonetheless allow an appeal if it is satisfied that the justice of the case can only be met by such an approach (see *Lawless v Aer Lingus Group plc* [2016] IECA 235; *Collins v Minister for Justice, Equality & Law Reform* [2015] IECA 27, and *Lismore Builders Ltd v Bank of Ireland Finance Ltd* [2013] IESC 6). In *Meehan v Ireland*, Allen J succinctly stated the threshold for intervention by this Court at para. 39 as requiring the appellant to:

> "*. . . establish either that the High Court judge failed to identify the correct legal test or – if she identified the correct test – that there was either a manifest error of appreciation in the application of that test, or an unfair result.*"

Grounds (ii) and (viii)

33. I will deal with the first ground of appeal at the end of this judgment. The second ground of appeal relates to a claim of privilege under s. 17 of the Act of 2009. Ground (viii) relates to the question whether this is a matter for the jury to decide. By her appeal, the defendant invites the court to rule on this point of law in advance of the retrial which has been directed by the High Court. The defendant has not brought a motion for a trial of a preliminary issue on a point of law to determine whether or not the 2019 publications enjoy absolute privilege by virtue of the application of s. 17 of the Act of 2009. Instead, as part of her motion to strike out the proceedings, she invites the court to try that preliminary issue and determine it in her favour. This approach does not avoid the court considering whether it can

justly decide such an issue on a preliminary basis in advance of and separate from a full plenary hearing. There are principles which govern the question of whether it is appropriate to proceed by way of a trial of a preliminary issue, and they are not circumvented by adopting the approach followed by the defendant in these proceedings. Critically, facts must be either agreed, even if only for the purposes of the trial of the preliminary issue, or must not be in dispute. In this instance, a key fact is hotly contested: do the publications of July 2019 identify a class of persons of whom the plaintiff is one, the class being the brothers of the late Veronica Guerin, or, as the defendant says, do the publications identify an individual – Mr Martin Guerin – and not concern a class of persons at all? This dispute precludes the resolution of the legal question by way of a trial of the preliminary issue.

34. Secondly, s. 17(2) affords absolute privilege to publications which come within the scope of the section. It affords no privilege to those falling outside the scope of the section. The part of section 17(2) invoked by the defendant provides:

> *"(2) …it shall be a defence to a defamation action for the defendant to prove that the statement in respect of which the action was brought was—*
>
> > *…,*
> >
> > *(h) made in the course of proceedings involving the exercise of limited functions and powers of a judicial nature in accordance with Article 37 of the Constitution, where the statement is connected with those proceedings,*
> >
> > *(i) a fair and accurate report of proceedings publicly heard before, or decision made public by, any court—*
> >
> > > *(i) established by law in the State, …"*

This means that the defendant must prove that the statement in respect of which the action was brought was "*(i) a fair and accurate report of proceedings publicly heard before, or a decision made publicly any court . . . established by law in the State"*. It follows that to

succeed on this defence, the defendant must prove that her publications were a fair and accurate report of the proceedings in the Circuit Court in July 2019 before it can be said that the publications are privileged. Clearly, this is a matter of fact which falls to be determined by the trier of fact.

35. This creates two difficulties for the defendant in her appeal. Firstly, on a motion to dismiss proceedings brought pursuant to O. 19, r. 28, a court may not engage in a summary trial. It may only engage with *disputed* facts to a very limited extent. Here, the dispute is central to the issues between the parties. It is not possible to resolve this dispute on this motion.

36. Secondly, and even more fundamentally, in defamation proceedings, a judge is not the trier of facts. That is the preserve of the jury. It is therefore not open to the High Court to determine this key issue.

37. For these reasons, it is not possible for either the High Court or this Court to determine a question of absolute privilege based upon s. 17 of the Act of 2009 as a preliminary matter.

38. In addition, in this appeal, even if the defendant could have succeeded on this point in this motion in relation to the July 2019 publications – and I have held that she cannot – at most, it only addresses part of the plaintiff's claim. It was not relied upon by the defendant as a defence to the claim based upon the publications of 2023/2024. It follows that it cannot provide an entire answer to the plaintiff's claim and therefore it cannot be a basis to strike out the proceedings in their entirety.

Ground (iii)

39. The third ground of appeal invokes s. 26 of the 2009 Act. In the first instance, I should observe that it is not clear that the defendant has pleaded her reliance on s. 26 in her amended

defence or that the matter was raised in argument before the High Court on 5th March 2025. Certainly, s. 26 is not expressly referred to by the trial judge in her judgment. However, the section is pleaded in the notice of appeal. While that of itself would not necessarily suffice to entitle an appellant to introduce a new argument not previously raised into an appeal, I am prepared to consider the argument on its merits on the basis that it was fully argued on the appeal, notwithstanding the plaintiff's submission that it was not open to the defendant to seek to rely on this defence at this stage of the proceedings.

40. Section 26(1) provides**:**

> "*26.— (1) It shall be a defence . . . 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.*"

Subsection (2) says that in determining whether it was fair and reasonable to publish the statement concerned, the court has to take into account such matters as the court considers relevant and lists a number of matters which it may consider. It is clear that in order to avail of this defence successfully, the defendant must prove the matters set out in (a), (b) and (c) of subsection (1). This means that they must be proved and established by the trier of fact. For the reasons I have already explained, the trier of fact in a defamation case where the trial is by a judge and jury, is the jury. It follows that, for the reasons already explained, on a motion

to dismiss the proceedings, the High Court - or this Court on appeal - cannot determine whether the defendant has proved the matters identified in s. 26 and thus can rely on a defence based on the section. To do so would be to usurp the function of the jury. That is impermissible.

41. This is underscored by the provisions of subsection (4) which provides that the court referred to in s. 26 means, in relation to a defamation action brought in the High Court, the jury, if the High Court is sitting with a jury. Subsection (2) makes it plain that for the purposes of this section – s. 26 – the court -*i.e.* the jury in this instance- shall make the determination whether it was fair and reasonable to publish the statement concerned. It is clear, therefore, that a High Court judge is not charged with determining whether it was fair and reasonable to publish the statement concerned and to do so would be to exceed their jurisdiction and to stray impermissibly into the role of the jury as triers of fact. It follows that this Court is likewise precluded from making any such finding on an appeal from the motion to strike out the proceedings as being bound to fail.

42. I should further add that as the defendant has not pleaded a defence based on s. 26, strictly speaking, this is not an issue in the proceedings unless and until it is pleaded. It is not part of her defence as it currently stands.

Ground (iv)

43. By this ground, the defendant argues that the proceedings should be struck out as they have been brought by the plaintiff, not to vindicate his name and reputation, but to attack, punish and silence a journalist. The High Court held, on the basis of the decision in *Gilchrist*, that it was permissible for the plaintiff to bring proceedings to seek a declaration that he had been defamed, and the improbability of recovering an award of damages from the defendant did not thereby render those proceedings pointless or an abuse of process. As a matter of law,

this seems to me to be correct, given the decision in *Gilchrist.* Therefore, *prima facie*, the fact that the plaintiff instituted and maintained the proceedings in defamation in respect of the publications complained of in the proceedings, does not amount to an abuse of the processes of the court. The question then is whether there are additional factors which might make such proceedings abusive.

44. The defendant says that the plaintiff is a politician and that he is suing the defendant in respect of a post she published in the course of her work as a journalist. Those facts in and of themselves do not render the proceedings abusive. Politicians are entitled to bring defamation proceedings and journalists are not immune from defamation proceedings being brought against them. Simply put, the plaintiff was entitled to sue the defendant in respect of the 2019 publications and the publications of 2023/2024. It is an entirely separate matter whether or not he will succeed in his proceedings.

45. Furthermore, it is difficult to reconcile the argument that, as a journalist, the defendant must be entitled to criticise the plaintiff because he is a politician and to highlight political corruption, with her primary assertion, that she was not writing about the plaintiff at all, but about his brother. Therefore, on her own case, the 2019 publications do not involve a politician at all, and by extension, a journalist writing about a politician. In addition, the posts of 2023/2024 were in respect of the plaintiff as a litigant, not as a politician, and her posts were in respect of the conduct of the case and submissions made and affidavits sworn in the proceedings, and do not relate to his role as a politician or to alleged political corruption. In these circumstances, I am not persuaded that she has established additional factors which renders the continuation of these proceedings by the plaintiff abusive.

46. The defendant's next argument is that the manner in which the plaintiff has conducted the proceedings is oppressive of her and is intended to cause her damage. She complains about the fact that the plaintiff obtained an order from the High Court deeming service good

and directing substituted service of documents at her home address. She complains about the affidavit grounding the application and the fact that her home address thereby became public. The fact is that the High Court made the order sought and it has been acted upon. Critically, the order was never appealed. Furthermore, Humphreys J rejected all of her complaints when he rejected her application to set aside the order, saying:

> "*I want to record clearly that the defendant has failed to substantiate any of her allegations of wrongdoing made against the plaintiff's legal team.*"

The defendant did not appeal the order of Humphreys J. She is not therefore entitled to reagitate complaints relating to the obtaining of the relevant order, and they certainly cannot be relied upon in this appeal to bolster an allegation of abusive conduct of litigation.

47. The defendant complains about the evidence given and the submissions advanced at the jury trial in November 2023 before O'Connor J. Crucially, during the trial, the defendant was legally represented and there was no indication that her counsel raised any objection to any of the conduct of the plaintiff or his lawyers during the trial. If the submissions of the plaintiff's counsel were as outrageous as the defendant asserts, the matter should have been raised at the trial by the defendant's counsel and should have been ruled upon by the trial judge. This did not occur and that weighs heavily against the defendant's arguments.

48. In addition, I find it extremely significant that the judge who presided over the jury trial was the judge who heard and determined the motion issued by the plaintiff on 15th December 2023, seeking relief in relation to the post-trial publications of the defendant. On 23rd January 2024, O'Connor J granted an interim order:

> *"…that the Defendant be restrained pending the trial of this action or until the determination of further interlocutory applications by the parties from: - (1) Maintaining, repeating or publishing through any medium of communication any posts which assert or imply that any member of the Plaintiff's legal team have told*

lies or committed crimes in relation to these proceedings (save that the Defendant may aver on affidavit for the adjudication of any application in these proceedings, facts which she can establish by independent admissible evidence to be true and necessary for the determination of applications in these proceedings); (2) Maintaining, replicating or publishing online or through any medium of communication photos or images of any and all members of the Plaintiff's legal team."…

49. The court granted the order on the basis of the evidence the trial judge described as a *"a litany of disturbing events".* O'Connor J said that the defendant's allegations that counsel for the plaintiff had acted in contempt of court and had engaged in fundamental breaches of proper court procedure and natural justice did not advance the position of either party and he referred to her conduct as a rather unique effort to dissuade the plaintiff from proceeding to trial. At para. 36 of his judgment, he said that he was "*satisfied from uncontroverted evidence . . . that the defendant has sought to thwart the intention of the plaintiff to proceed to a retrial by her ad hominem campaign against individual members of the plaintiff's team".* It is striking that he made no observation at all that the conduct of the plaintiff – or his lawyers – would mean that there could not be a fair trial by a jury in due course. Far from criticising the conduct of either the plaintiff or the plaintiff's legal representatives, the trial judge granted relief in respect of the plaintiff's legal representatives and permitted the plaintiff to amend his proceedings to include claims of defamation based on her publications between the end of 2023 and early 2024.

50. The judgment and order of O'Connor J were not appealed by the defendant. Furthermore, it appears that the defendant decided that she would counterclaim against the plaintiff in these proceedings in respect of the statements of the plaintiff and his legal representatives in the course of hearings before the High Court and in affidavits sworn in the

course of the proceedings. So, while she seeks the dismissal of the plaintiff's proceedings in this appeal, she wishes to maintain her counterclaim against the plaintiff in which his – and his lawyers – conduct of the proceedings to date will form the central claim. Thus, she is asking this Court to find that the plaintiff's conduct of the proceedings has been so oppressive and abusive that he should no longer be entitled to pursue his claim against her but that she should be entitled to pursue her claim against him for damages for defamation in respect of the very matters which she says justify a summary dismissal of the plaintiff's case.

51. In my judgement, this is not permissible. Judges who are intimately familiar with the conduct of the plaintiff and his lawyers and the defendant's complaints, have emphatically rejected the latter, and those judgments were not appealed. She cannot now contend that the proceedings are being used to tell grave and vindictive falsehoods about her under the cloak of privilege as a basis for striking out the proceedings in advance of trial. Whatever merit there may have been in the defendant's complaints regarding the conduct of the litigation to date- and I am making no such finding which will be a matter for the jury- they come nowhere near establishing that the plaintiff has abused his right of access to the courts and his right to bring these defamation proceedings to trial. Whether he or she or either of them will succeed at trial will be determined by a jury. I would reject this ground of appeal.

52. For the sake of completeness, I should note that the SLAPP Directive is of no relevance to these proceedings as the Directive has not yet been transposed into Irish law, as the defendant accepted during the hearing of the appeal. I will therefore not consider whether the proceedings could amount to SLAPP litigation within the meaning of the Directive. In my view, the Directive does not and cannot apply by analogy prior to its transposition into national law in circumstances where the date for transposition has not yet expired.

Ground (v)

53. The defendant argued that a fair trial was not possible on the basis that the publication by the media of the complaints made by the plaintiff in response to her publications post the trial in November 2023 until January 2024 has effectively poisoned the well of potential jurors. This is not a matter which properly falls within the scope of an application brought pursuant to O.19 r.28 at all. It follows that it does not provide a basis for her to succeed under an application to strike out the proceedings pursuant to the rule, or on appeal.

54. In any event, the substance of the argument does not withstand scrutiny. O'Connor J dealt with the plaintiff's complaints that if the defendant's publications of late 2023/2024 are "*not restrained or taken down, [they will] poison the well of potential jurors so that he could not have a fair trial".* O'Connor J rejected this contention on the grounds that jurors could be properly instructed by the trial judge to disregard matters extraneous to the trial, and in particular, the publicity surrounding the publications of 2023/2024. Obviously, those publications form part of the plaintiff's amended claim and therefore will be the subject of the trial in due course. In my view, O'Connor J's observations apply equally to the defendant's concerns. On her own case, she wishes to proceed with her counterclaim which is a claim for defamation based on the allegations and evidence advanced by the plaintiff after the jury disagreed in November 2023 and up to the date of O'Connor J's restraining order of 23rd January 2024. It follows that her complaint that it will not be possible to empanel an unbiased jury must be based upon reports in the media of those submissions and affidavits made in the applications before O'Connor J yet those self-same submissions and affidavits are the substance of her counterclaim. It seems to me that the plaintiff's claim and the defendant's counterclaim are both defamation claims and therefore both should be tried by a jury. As the defendant wishes to proceed with her counterclaim, she must therefore be taken to accept that it can properly be heard by a jury, notwithstanding her protestations that a fair trial is not

possible. Her argument that the well of potential jurors has been poisoned is inconsistent with her intention to proceed with her counterclaim.

55. The defendant cites five authorities in support of her argument that she cannot have a fair trial in the circumstances. *McBrearty v Northwestern Health Board* [2010] IESC 27 concerned whether the proceedings should be struck out on grounds of delay on the basis that the passage of time put a fair trial in jeopardy. This has no application to this appeal. In *De Cubber v Belgium* (1985) 7 EHRR 236, the Strasbourg court quashed a criminal conviction because the impartiality of the court was capable of appearing to the applicant as open to doubt. That case concerned the impartiality of a judge and so is not relevant to the issues before this Court on this appeal. *Kyprianou v Cyprus* (2007) 44 EHRR 27 concerned the trial and conviction of a lawyer for contempt of court. It has no bearing on the issues in this appeal. *Buscemi v Italy* [1999] ECHR 29569/95**,** likewise, does not assist the defendant. It concerned statements made to the press by the judge concerned and thus cast doubt on the impartiality of the tribunal. There is no such issue in these proceedings. Finally, *Steel & Morris v UK* (2005) 41 EHRR 22 concerned proceedings which were held to be unfair, principally because of the denial of legal aid given the scale of the monumental action, which was described by the court as an enormous and very technical case. The trial at first instance lasted 313 days, involved 130 oral witnesses, 28 interlocutory applications and the appeal took 23 days. There is simply no comparison whatsoever with these proceedings.

56. In my judgement, the material before the court comes nowhere near establishing the level of adverse or unfair publicity which must be established before the court could properly conclude that it would not be possible to have a fair trial on the merits before a judge and jury. As I have said, the defendant intends to pursue her counterclaim which means that a jury will have to consider these self-same allegations. In effect, she is saying that a jury will be prejudiced to such an extent that she will not be able to defend the plaintiff's claim, but it will

not be so prejudiced that it will be incapable of trying her claim in respect of the identical material against the plaintiff. That is untenable.

Ground (vi)

57. In her notice of appeal, the defendant pleaded that the trial judge evinced objective bias in her approach to the motion. This argument was not pursued in her oral submissions. In her written submissions, she complained that the High Court refused to allow her to read her affidavit into the record, referred to her as someone who "*describes herself as an investigative journalist"* and stated that she was not entitled to *"say whatever she likes"* or to defame people, in circumstances where no court has ever found her to have defamed anyone, and the High Court referred to prior litigation taken against her by Beaumont Hospital in a manner which was inaccurate, incomplete and unfavourable. The defendant argued that these remarks, taken together with the *"refusal to engage with her evidence"* gave rise to a reasonable apprehension that the court had formed an adverse view of her credibility and professional status and therefore the appeal should be allowed on the basis of established objective bias on the part of the trial judge.

58. The trial judge had read the papers prior to the court sitting to hear the motion. In those circumstances, the court is perfectly entitled to refuse to allow a party to take up valuable court time reading an affidavit out in open court. Not only is this well within the discretion of a judge in the conduct of a motion, it falls very far short of establishing any objective bias on the part of the trial judge. At para. 9 of her judgment, Phelan J notes that the defendant describes herself as an investigative journalist. This is taken from the defendant's amended defence and counterclaim, where, at para. 1, it is pleaded the *"Defendant is a multi-award-winning investigative journalist"*. The defendant infers that because the trial judge says that she describes herself as being an investigative journalist, rather than she is an

investigative journalist, that this implies that she was biased against her. However, the judge's choice of words has to be seen in view of the fact that the plaintiff pleads, at para. 2 of his statement of claim, that the defendant is a former journalist. Thus, the professional role of the defendant is a contentious one between the parties and it was not appropriate for the judge to come down in favour of one side or the other on that issue on the hearing of this motion. Certainly, the judgment is not in any way undermined by the use of this neutral approach to this disputed issue.

59. The third and fourth of the defendant's complaints regarding the High Court judge derive from para. 57 of her judgment. This provides as follows:

> *"57. The Defendant protests that these proceedings are abusive because she is a journalist and the purpose of the proceedings is to silence her. There is no evidence for this proposition beyond the Defendant's belief. The contention that the proceedings are maintained for improper and abusive purpose therefore rests on bare assertion and are not properly substantiated. Her arguments in reliance on the importance of press freedom cause me to recall the words of Allen J. in Beaumont Hospital v. O'Doherty [2021] IEHC 469. In his judgment in that case, Allen J. acknowledges the importance of free speech, freedom of expression, the role of journalism and the free press but points out that journalists, no less than citizens in general, are not entitled to wantonly or recklessly traduce reputations. The mere fact that the Defendant is a journalist who has rights to express herself does not permit the Defendant to say whatever she likes and specifically, does not permit her to defame another person in her publications."*

60. A judge is always entitled to refer to relevant legal precedent. In this case, Phelan J referred to the decision of Allen J in *Beaumont Hospital v O'Doherty* [2021] IEHC 469. In that case, Allen J held, at paras. 28 and 29 as follows:

"28. The starting point then is to recognise the importance of the right to free speech and the freedom of expression of opinion. This is a right of every citizen which is zealously protected by law. If in principle the legal position of a journalist is no different to that of any other citizen, the importance of protecting free speech is all the more obvious where an order is sought to restrain publication or re-publication by a journalist. Ms. O'Doherty quite rightly emphasises those passages from the judgment of Kelly J. in Reynolds v. Malocco which underline the importance of free speech. That importance is recognised by the law in the approach which is taken to applications for interlocutory injunctions. By contrast with the general rule, the jurisdiction of the court is not engaged by showing merely that there is an issue to be tried as to the defendant's entitlement to have spoken or written the words complained of, or even that the plaintiff has shown that he has a strong case which is likely to succeed at trial. Rather the plaintiff must show that the words complained of are defamatory and that the defendant has no defence which is reasonably likely to succeed.

29. The other side of the coin is that the right of free speech is not an absolute right. The subject of a damaging statement has a right to his or her good name and reputation and a right to call upon the court to protect and vindicate that right. Often the circumstances of a case are such that the remedy can only be an award of damages after a trial but sometimes, in the clearest of cases, the court can be asked to intervene before the trial. Plainly there is no public interest in the publication of material which is untrue. The unquestionable public interest in free speech does not apply where it can be shown that the damaging words are clearly untrue, or, put the other way around, where it can be shown that the publisher – although he

may assert that the words are true – has no reasonable prospect of establishing that they are."

61. The trial judge cited this as authority for the proposition that journalists, no less than citizens in general, are not entitled to wantonly or recklessly traduce reputations *i.e.* defame people or companies. The fact that the law of defamation applies to journalists as well as citizens in general, Phelan J points out, means that the mere fact that the defendant is a journalist who has the right to express herself, does not permit her to defame another person in her publications. The fact that the trial judge says that being a journalist does not permit the defendant "*to say whatever she likes, and specifically, does not permit her to defame another person in her publications"* comes nowhere close to establishing objective bias. It is clearly based on her summation of the meaning of the decision in *Beaumont Hospital* and her reliance on same for the principle that journalists, no less than citizens, are subject to the law governing defamation.

62. The defendant complains that these remarks, *"taken together with the refusal [of the High Court] to engage with her evidence"*, gave rise to the reasonable apprehension that the court *"had formed an adverse view of her credibility and professional status".* Firstly, a court is entitled to form an adverse view of a witness's credibility and that fact that a judge does so, in and of itself, is not and cannot be evidence of objective bias. Sometimes, it is precisely the role of the judge to decide between the credibility of different versions of events. Secondly, the trial judge made no finding in relation to the defendant's credibility, but rather, criticised her lack of restraint in the conduct of the hearing before her. There is nothing to suggest that the trial judge had formed an adverse view of the defendant's "*professional status"*, and even if she had, it is not at all clear how that could support a contention that the trial judge was guilty of objective bias. There can be no question of the trial judge "*refusing to engage"* with the defendant's evidence, she clearly set out the core elements of the defendant's claim and

arguments. She expressly held that she was not entitled to reach findings of fact where the jury was the proper of trier of fact, and not a High Court judge.

63. In my judgement, the defendant has made out no basis for suggesting that the trial judge evinced objective bias and I would refuse this ground of appeal.

<u>Ground (vii)</u>

64. The defendant's case on this ground of appeal is set out in paras. 45 and 46 of her written submissions. She notes the length and expense of the proceedings and refers to public information "*suggesting that [the plaintiff] has had countless financial difficulties".* She is concerned that there *"may be third-party funding or other arrangements which, if established, could amount to maintenance or champerty"* which is still prohibited in Irish law. She acknowledges that these matters *"are at the level of suspicion and will depend on evidence",* but she submits that if the court is *"satisfied that the litigation is being pursued with external support for an improper purpose – to silence a journalist rather than to vindicate reputation – this would further support a finding of abuse of process and the appropriateness of a strike-out".*

65. It is immediately apparent from this submission that there is in fact no evidence whatsoever to support an argument that the plaintiff's proceedings have been supported by third party funding, or that there has been maintenance or champerty in relation to these proceedings. She herself says that her submissions are at the level of suspicion and will depend on evidence which is patently lacking. I agree entirely with the finding of the High Court judge that this was *"bare assertion"* and have no hesitation in rejecting this ground of appeal.

Ground (i)

66. The defendant contends that the trial judge erred in the application of O. 19, r. 28. She contends that the court was entitled to consider the merits and the evidence, but that the High Court treated the existence of a "*stateable*" pleaded defamation claim as effectively dispositive of the application (para. 60) without fully engaging with the question whether, in light of ss. 17 and 26 of the Act, and the accepted context, the claim has any realistic prospect of success. She contends that this amounted to a misinterpretation of the rule. The defendant argues that the court is required to assess whether the defendant's pleaded defences, taken at their height, rendered the action doomed in law. She says that the High Court confined itself to assessing the pleaded cause of action, this was "*a standard narrower than that mandated by O. 19, r. 28*". She said that the High Court erred in holding that the defendant's reliance on s. 17 is a matter for the jury to decide "*when it is patently a purely legal matter*".

67. For the reasons I have already explained, in my view, the trial judge was correct in holding that it was not open to her to make definitive rulings in relation the defendant's claim to a defence based on ss. 17 and 26 of the Act of 2009. Definitive rulings in relation to these matters are dependent upon findings of fact which have to be made by the triers of fact, which, in this instance, is the jury. I would refuse this ground of appeal.

68. The defendant also contends generally that the High Court failed properly to apply the jurisprudence in relation to the striking out of proceedings to this case. It will be recalled that O. 19, r. 28 empowers the court to strike out any claim or any part of a claim which:

> *"(i) discloses no reasonable cause of action, or*
>
> *(ii) amounts to an abuse of the process of the Court, or*
>
> *(iii) is bound to fail, or*
>
> *(iv) has no reasonable chance of succeeding."*

69. It is undoubtedly the case that the pleaded claim discloses a reasonable cause of action. It pleads a claim in defamation. Therefore, it could not be struck out on the basis of (i). I agree with the trial judge's conclusion at para. 60 of her judgment, and I reject the contention that this amounts to an error of law, as asserted by the defendant.

70. Subrules (iii) and (iv) require the court to consider whether the claim is bound to fail or has no reasonable chance of succeeding. This does not mean, contrary to the defendant's submission, that her pleaded defences must be taken at their height and that the court is required to conclude that the action is doomed in law. The High Court addressed these subrules at para. 61 of her judgment. The trial judge's statement that, in view of the that fact the previous jury did not dismiss the claim against the defendant, precludes her from concluding that the proceedings are bound to fail or have no reasonable prospect of success is unimpeachable. Furthermore, as the trial judge pointed out, the claim has now been expanded by the inclusion of pleas in defamation arising from the publications in 2023/2024, and the defences referred to by the appellant do not address this aspect of the claim at all.

71. The remaining subrule – that the proceedings amount to an abuse of the process of the court – have already been specifically dealt with. For the reasons I have explained, I agree with the conclusions of the trial court that nothing in the plaintiff's proceedings amounts to an abuse of the process of the court. The suggestion that the proceedings are maintained for the improper purpose of silencing the defendant, or that someone else must be funding the proceedings (thereby making them champertous), are claims which are not substantiated and which are no more than bare assertions, or even suspicions on the part of the defendant. In my view, the trial judge was correct in concluding that the defendant had fallen well short of establishing that the pursuit of the claim amounted to an abuse of the process of the court, such as would entitle or justify the court in striking out the proceedings prior to trial.

Use of Artificial Intelligence in Proceedings

72. The defendant used AI to prepare the written submissions, which she filed in support of her appeal. Unfortunately, and perhaps as was to be expected, given the nature of large word model Artificial Intelligence systems, the submissions included references to authorities which simply did not exist. These were hallucinations, so-called, generated by the AI system. There were no such cases, and they were not authority for the propositions which they purported to establish. This is an inherent and well-known risk of using AI to write legal submissions. The defendant did not apparently verify the existence of the authorities she cited, or that the cases relied upon actually supported the propositions advanced. Neither did she notify the solicitors for the plaintiff that she had prepared her submissions with the assistance of AI. Counsel for the plaintiff informed the Court that this added to their work in requiring them fruitlessly to attempt to locate the hallucinated authorities and thereby needlessly added to the costs of the plaintiff in the appeal.

73. Parties, whether represented or not, have an obligation not to mislead the court, which includes the obligation not to rely upon or advance submissions based upon "*fake*" authorities or propositions which have no basis in law. In addition, lawyers are subject to professional and ethical obligations in relation to the use of AI when practicing their profession which do not apply to a litigant in person. I do not propose to address these in this judgment as they do not arise in this case.

74. I am concerned that parties, including litigants in person, should use AI appropriately and should be given guidance as to how they may properly use AI in their litigation. I would therefore set out the following principles of general application:

(i) Parties are entitled to use AI to *assist* in carrying out research in respect of their case *provided* that they do so responsibly and *do not, even inadvertently, mislead* the court

by advancing propositions or relying upon supposed authorities which in fact have no foundation at all and are simply hallucinations.

(ii) In all cases where they do so, they should expressly inform both the other parties and the court of their use of AI in this regard.

(iii) A self-represented party is responsible for the ultimate written or oral work in their case just as much as the lawyers representing parties are.

(iv) It is important therefore that any party who uses AI as part of their research independently verifies the accuracy of their submissions and the authorities cited as supposedly establishing the propositions advanced.

(v) No authority should be cited by a party who has not actually verified that it is a genuine judgment of the court and that it is – or at least arguably is - authority for the proposition contended for.

75. It is not acceptable for parties uncritically to provide submissions which purport to rely on cases or propositions the existence of which they have not verified. It leads to completely wasted time and costs. It casts an unfair burden on the opposing party in their preparation of their response to the submission or in preparing the books of appeal. It potentially brings the administration of justice into disrepute and may result in misleading the court. Parties should be aware that the court has a variety of sanctions open to it where parties use AI in breach of these guidelines and where their use has the potential to mislead the court.

76. For the avoidance of doubt, I wish to make it clear that I do not believe that the defendant intended to mislead the court or that she was actually aware of the fact that some of the cases cited in her written submissions were hallucinations. While it would have been preferable if she had informed the plaintiff's solicitors of her use of AI to produce her written submissions, and thus to the likelihood that the authorities they could not readily locate were hallucinations, I would not draw any adverse conclusion against her. At the time submissions

were prepared in this appeal, no guidance was available to litigants in person in relation to their obligations to the other parties to the proceedings and the court as regards the use of AI generated material in proceedings.

Conclusions

77. For all of these reasons, I would reject the appeal and affirm the judgment of the High Court.

78. My preliminary view is that the defendant has been unsuccessful on the appeal, and the plaintiff has been entirely successful on the appeal and, accordingly, should be entitled to the costs of the appeal in accordance with the rules of court and s. 169 of the Legal Services Regulation Act 2015. If the defendant wishes to contend otherwise, she may contact the Office of the Court of Appeal within fourteen days of the delivery of this judgment, furnishing a submission of no more than 2,000 words setting out the alternative order for costs for which she contends and the basis for her submission. In the event that she files such a submission, the plaintiff will have a further ten days in which to respond, likewise, limited to 2,000 words. The panel will then deliver a further ruling on the question of the costs of this appeal.

79. Binchy and O'Moore JJ have authorised me to indicate their agreement with this judgment and the proposed orders.