

APPROVED

[2021] IEHC 798



THE HIGH COURT

[2020 1761 P]

BETWEEN

JOE COSTELLO

PLAINTIFF

AND

RADIÓ TEILIFÍS ÉIREANN, IRELAND AND THE ATTORNEY GENERAL

DEFENDANT

JUDGMENT of Mr. Justice Tony O'Connor delivered on 17 December 2021

Introduction

1. Before the Court is a notice of motion seeking “an order pursuant to O. 19, (28) of the Rules of the Superior Courts [“RSC”] and/or the inherent jurisdiction of the court striking out the proceedings of the plaintiff [“Mr. Costello”] against the first named defendant [“RTÉ”] on the grounds that they disclose no reasonable cause of action, are unsustainable, are frivolous and vexatious, and are bound to fail”. No defence for RTÉ has been filed to date.

2. Counsel for RTÉ limited the application at the hearing of the motion to a request for a determination pursuant to the inherent jurisdiction of the Court that the claim against RTÉ is bound to fail.

Agreed facts for this application

3. As it is not appropriate for the Court to assess evidence in this type of application, the parties prompted by the Court produced “an agreed statement of facts”. That statement is only for this application and does not constitute any admission or finding of fact by the Court. Rather, it has been possible as a result of the exchange of affidavits in this application for the parties to identify facts which can be taken by the Court as facts but limited to this application only.

Request for a panel member

4. In advance of the “Saturday with Claire Byrne Show” broadcasted on 24 October 2015 (“**the show**”), a radio producer for RTÉ requested the Government Information Service (“**GIS**”) to provide a representative for the then – Fine Gael/Labour coalition government. When a government minister was not available, the GIS referred such a request to each of the press offices of those two political parties. In this instance, Mr. Costello who was then a Labour Party Teachta Dála (“**TD**”) ended up as a guest on the show. The effect of how he became a guest on the show remains in issue. In other words, the implied terms and representations attaching to his appearance as alleged in the statement of claim are denied in the affidavits filed for RTÉ.

The impugned statements

5. Mr. Eoin Ó’Broin (“**EO**”) then a Sinn Fein councillor, was another panel member on the show. The following excerpts of exchanges between Claire Byrne (“**CB**”), Mr. Costello

(“**JC**”) and EO are taken from the transcript of the show from 14:29 and are exhibited to the first affidavit filed on behalf of RTÉ in the current application before this Court:

“**JC**: “I’m not saying that, what I’m saying is that there is a parallel structure in place which is the Army Council and that that is influencing what Sinn Fein does. Now I, can see for example, if I look at Dublin City Council, there is a former Chief of Staff of the IRA in Dublin who gives direction to the councillors”

CB: “How do you know that?”

JC: “Because he’s there at every meeting”.

(14:53)

EOB: “He is a Sinn Fein member. He is employed by the party as part of our political coordinator to ensure consistency across the four Sinn Fein Council groups in the city. His name is Nicky Kehoe and it is an absolute outrage for Joe to infer, as he’s doing that Nicky is in there acting on behalf of the IRA Council. Nicky is a long standing member of our party. He is a person who has devoted an incredible amount to the well-being of his community. As Joe knows. So, Joe it’s time for you to start being a little bit straight here.

JC: “So . . . what I’m saying . . . what I’m saying . . . is that this is a person who is a senior member of the Army Council, this is a person who is there at every meeting of the Dublin City Council”.

CB: “IS? Are you saying IS?”

(15:28)

JC: “IS”

JC: “And all the little heads swivel around when a decision has to be made and that is the context in which it happens”.

EOB: (speaking over) “I’m sorry Claire, that is just the most bizarre, of all the bizarre things Joe has said this last week that is the most bizarre and outrageous thing. And he knows Nicky Kehoe well. And he knows”.

JC: (speaking over) “It is a fact . . . course I know Nicky well”.

6. The transcript excerpts then show some debate about whether Mr. Costello maintained the present or the past tense when he referred to the alleged membership of the Army Council.

Threat of defamation proceedings

7. After the broadcast, Mr. Kehoe threatened defamation proceedings by letter of 19 November 2015.

8. Mr. Costello has averred that he had “... been doing interviews with RTÉ for almost 50 years and [he] always understood that current affairs programmes had a facility to delay the broadcast of panellists’ words”. It was only after the deponent for RTÉ swore an affidavit on 22 April 2021 that he learned about the absence of such a facility.

9. It is common case that Mr. Costello was made aware of the threatened proceedings of Mr. Kehoe. He had replied to the producer of the show by email of 28 November 2015 which queried the libellous nature of anything which he had said.

10. RTÉ accepts solely for this application, that the producer of the show had never suggested a follow up meeting, telephone call or briefing about the progress of the defamation proceedings commenced by Mr. Kehoe on 4 March 2020.

The trial

11. Again, for this application only, RTÉ accepts that the trial of Mr. Kehoe’s defamation action commenced on 14 February 2016 without the knowledge of Mr. Costello. He has averred that he only learned about the action through media reports and specifically:

“If I had known the nature of the defence offered by RTÉ, I would have sought to be legally represented in the matter”.

Defence of RTÉ in the jury action

12. Barton J. in the proceedings entitled *Nicky Kehoe v. Radió Telefís Éireann* [2018] IEHC 340 (Unreported, High Court, 21 February 2018) summarised the defence of RTÉ as follows at para. 2:

“2. In these circumstances, the defence delivered incorporates a plea pursuant to s.35 (1) of the Civil Liability Act, 1961, (“**the CLA**”), as amended. The object and effect of the plea is to fix the plaintiff with responsibility for the wrongful acts of Joe Costello, a statute barred defendant, so as to reduce by the extent of that responsibility the amount of the damages, if any, the jury may award to the plaintiff. In short, s. 35 (1) (i) deems the liability of the statute barred defendant a form of contributory negligence which may be pleaded against the plaintiff by way of defence to his claim. The essence of the plea involves identifying the plaintiff with the responsibility for the wrongful acts of the statute barred defendant.

3. Identifications for the purposes of contributory negligence in general are governed by the provisions of s. 35 of the CLA. Subs. (1) (i) is concerned with identification in circumstances where the plaintiff’s damage is caused by concurrent wrongdoers and where the plaintiff has permitted the claim against one or more of them to become statute barred.

4. The plea in this case had also been raised in respect of Eoin O’Broin but was abandoned by the defendant in the course of hearing. He identified the plaintiff by name on air but spoke out in his defence during the material exchanges, the substance of which has been relied on by the defendant to meet the claim. The plaintiff is a senior member of Sinn Féin in Dublin; he makes no complaint against his party colleague. The same cannot be said for Joe Costello who, without mentioning the plaintiff by name, uttered the remarks about which complaint is made and simultaneously published by the defendant.”

13. In summary, Barton J. held that Mr. Costello and RTÉ were concurrent wrongdoers within the meaning of s. 11 of the Civil Liability Act in respect of any defamation claim which Mr. Kehoe had and that RTÉ was therefore entitled to put its plea under s. 35(1)(i) of the Civil Liability Act 1961 to the jury.

Mr. Costello’s statement of claim

14. In these proceedings, the following paragraphs of the statement of claim delivered on 4 March 2020 for Mr. Costello identifies the grounds for the claim now against RTÉ:

“16. On 26 February 2018, the jury returned a verdict in favour of Mr. Kehoe and assessed damages at the sum of €10,000. The jury found [RTÉ] 35% responsible for the defamation and held [Mr. Costello] to be 65% responsible. Accordingly, the award in Mr. Kehoe’s favour was reduced to €3,500 pursuant to s. 34(1) of the Civil Liability Act.

17. The jury in the Kehoe proceedings returned a verdict that [Mr. Costello] made a defamatory statement against Mr. Kehoe within the meaning of s. 6 of the Defamation Act.

18. [Mr. Costello] was not a party to nor witness in the Kehoe proceedings and had no opportunity to vindicate himself, raise a defence or otherwise rebut the allegations made against him. Had [Mr. Costello] been given the opportunity to participate in the Kehoe proceedings, he could have raised the statutory defences available to him under the Defamation Act.

19. Although [Mr. Costello] has not been required to make monetary compensation to Mr. Kehoe as a result of the jury verdict in the Kehoe proceedings, he has suffered the ignominy of a formal finding against him and his political credibility and reputation was damaged. He was not invited back on any of [RTÉ's] current affairs programmes.

20. By inviting [Mr. Costello] as a guest and panellist [RTÉ] agreed, warranted and thereby represented that [RTÉ] would vindicate his rights and that it would not expose him to opprobrium of the sort that would cause him damage to his political credibility and personal reputation and would keep him properly and fully informed of comments made and positions adopted in respect of him.

21. [RTÉ] is obliged under the Broadcasting Act 2009 and in particular s. 39 thereof, and codes and statements adopted thereunder to inter alia ensure fair impartial and objective treatment of current affairs and matters of public controversy, respect human dignity, acting in an open manner in all dealings and uphold the democratic values enshrined in the Constitution, especially those relating to rightful liberty of expression.

22. By the conduct of its defence and invoking a plea under s. 35 (1)(i) of the Civil Liability Act in the course of the Kehoe proceedings without joining [Mr. Costello] as a party to the litigation or otherwise giving him proper notice thereof, [RTÉ] acted in breach of the aforementioned agreement, warranty, and/or representation. [RTÉ]

breached its obligations under the 2009 Act and codes and statements adopted thereunder”.

The reliefs sought

15. Mr. Costello in these proceedings seeks a declaration that he “... was denied fair procedures together with natural and constitutional justice insofar as blame was apportioned upon him for defamation without his being afforded any reasonable opportunity to defend himself.” He also seeks a declaration that his constitutional rights were breached and that s. 34(1) of the Civil Liability Act 1961 is unconstitutional. Mr. Costello claims if necessary a declaration that s. 34 (1) of the Civil Liability Act 1961 is incompatible with the provisions of the European Convention on Human Rights. However, the constitution and convention issues are directed to the other defendants. A defence on their behalf was delivered on 16 March 2021.

Submissions for RTÉ

Right to be sued

16. RTÉ submits that there is no right to be sued or to be joined as a party in proceedings and it cites the statement of Costello J. in *Jones v. Coolmore Stud* [2016] IEHC 329 (Unreported, High Court, 14 June 2016) and approved by the Court of Appeal [2017] IECA 164:

“Even if a party has a cause of action against another party, there is no obligation on that party to sue. Therefore, the fact that the defendant has chosen not to institute defamatory proceedings against the plaintiff cannot constitute a wrongful act on the part of the defendant giving rise to a cause of action by the plaintiff against the defendant”.

Contract

17. RTÉ maintains that there was no contract with Mr. Costello and that it was dealing with the GIS and the Labour press office. It is also submitted on behalf of RTÉ that the basis for any claim based on implied terms through custom or fact has not been set out.

Warranty

18. RTÉ also contends that the alleged warranty and representation made to Mr. Costello that he would be informed properly and fully of comments made and positions adopted in any defamation proceeding have not been pleaded or referred to in any meaningful way in the exchange of affidavits.

Broadcasting Act 2009

19. RTÉ submits that the alleged obligation pursuant to s. 39 (1) (b) of the Broadcasting Act 2009 and Rule 3 of the Broadcasting Authority of Ireland's code of fairness, impartiality and objectivity in news and current affairs relied upon by Mr. Costello, is not a sustainable cause of action. The statement by Fennelly J. in *Glencar Exploration plc. v. Mayo County Council (No. 2)* [2002] 1 I.R. 84 is cited in support:

“A duty imposed by statute on a public body will not be held to create a right to damages for its breach unless it can be shown to have within the scope of its intendment a reasonably identifiable protective purpose and identifiable class intended to benefit”.

20. RTÉ also relies on the judgment of Charleton J. in *Doherty v. South Dublin County Council (No. 2)* 2007 IEHC 4; [2007] 2 I.R. 696 which held that applicants could not seek damages before the courts for a breach of the Equal Status Act. They cite para. 33 of the judgment where Charleton J. stated:

“...The fundamental rule of statutory interpretation remains, however, that stated by Tenterden C.J. in *Doe d. Murray v. Bridges* [1831] 1 B. & Ad. 847 at p. 859 ‘Where an act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner’ ”.

21. RTÉ submits that the Oireachtas did not intend that the Broadcasting Act and codes of practice made thereunder could be used to ground a cause of action against RTÉ.

Submissions for Mr. Costello

Not a documents case

22. It is emphasised on behalf of Mr. Costello that the inherent jurisdiction to dismiss centres on the interpretation of contracts and documents as opposed to the assessment of oral evidence which may be given. Counsel for Mr. Costello cited para. 15 of the judgment in *Millstream Recycling Ltd. v. Tierney* [2010] IEHC 55; [2010] 4 I.R. 253:

“A weak or innovative case based upon contested assertions of fact does not fit within the category of a case that should be dismissed unless it can be demonstrated that what the plaintiff asserts is utterly undermined by the known and readily ascertainable circumstances of the claim, usually in written documentary form; *Price and Lynch v. Keenaghan Developments Ltd.* [2007] IEHC 190, (Unreported, High Court, Clark J., 1st May, 2007)”.

23. The submissions for Mr. Costello highlight the difficulties facing a defendant seeking to strike out claims as RTÉ is doing so here. The judgment of the High Court in *Leinster Leader Ltd. v. Williams Group Tullamore Ltd.* [1999] IEHC 14 (Unreported, High Court, Macken J., 9 July 1999) is cited in support. There, the plaintiff sought damages for

misrepresentation and misstatement arising from a pre-contractual statement made in connection with the buyback of shares in the first defendant. The first and second defendants sought to strike out the claim on the basis that the representations were made by a representative of the third defendant only. In response the plaintiffs said the oral representations were made by the representative as agent of the first and second defendants. In refusing to strike out the claim, Macken J. commented at paras. 43 – 44:

“43. Even applying the principles with the rigour which McCarthy J. recognised in *Sun Fat Chan v. Osseous Limited* [1992] 1 IR 425, it seems to me that there is no question of the court being able to come to the view at this time that the claims of the plaintiff are unsustainable, nor are any of them. The kernel of the claim will be dependent on the establishment of the representation(s) made, the effect of those representations vis-a-vis the timing of the buy-back agreement, the precise meaning of the prior identification of the amount mentioned by Mr. Mortimer as being the correct transfer payment due, the precise meaning to be attached to the words "financially neutral insofar as the proposed purchase of shares" and other related matters.

44. None of this is dependent on written contracts or documents of the type referred to by Costello J. in *D.K. v. A.K.* [1993] I.L.R.M. 710 but on the contrary the representations, in particular, being allegedly made orally, will have to be considered in light of the overall evidence tendered”.

24. Counsel for Mr. Costello also referenced the following paragraphs from the judgment of Clarke J. in *Moylist Construction Ltd. v. Doheny* [2016] IESC 9; 2 I.R. 283 at 289 and 291:

“[12] . . . The default position in respect of any proceedings is that they should go to trial. Depriving the parties of a full trial in whatever form is appropriate to the

proceedings concerned is a departure from the norm, and one which should only be engaged in when it is clear that there is no real risk of injustice in adopting that course of action.

[18] . . . A court should not entertain an application to dismiss where the legal issues or questions of construction arising are themselves complex and such as would require the type of careful analysis which can only be carried out safely at a full trial and in circumstances where the facts can be fully explored”.

Not a summary trial

25. Particularly pertinent is the reference by counsel for Mr. Costello to the Court of Appeal judgment (Costello J.) in *Trafalgar Development Ltd. v. Dmitry Mazepin and others* [2019] IECA 218 (Unreported, Court of Appeal, 18 July 2019):

“[100] “. . . The plaintiffs are not obliged to prove their case in resisting the motion. This is not a form of summary trial. It is for the appellants to establish that the case is bound to fail”.

Contract

26. The submissions for Mr. Costello rely on the statements of Clarke J. in *Rowland v. An Post* [2017] IESC 20 [2017] 1 I.R. 355 and particularly at p. 363:

“It is also the case that certain private law disputes may give rise to a requirement to apply the rules of constitutional justice because such rules may, either by express inclusion or by implication, be taken to apply to a process arising under a contract whether that be, for example, a contract of employment, the contract which exists between the members of an organisation or, as here, a long term contract providing for a process which may lead to its determination for cause. As noted, some contracts, particularly employment agreements negotiated between employers and the

representatives of employees, may make express provision that the rules of constitutional justice are to apply in certain processes. There is no such provision in terms in the contract governing this case although, as will be addressed later, the term ‘fair opportunity’ is used. The extent to which it may be appropriate to imply a requirement to comply with the rules of constitutional justice into any contractual regime which does not make express provision for their inclusion is a matter to be considered on a case by case basis . . .”.

27. Mr. Costello effectively claims that constitutional justice was implied in his contract with RTÉ. RTÉ was required to involve him in the defence of the proceedings brought by Mr. Kehoe against RTÉ. In addition, Mr. Costello claims that the host of the show should have vindicated his rights and that it was a condition of him being a guest to be told that there was no delay system in operation for the broadcasting of the programme.

Statutory duty

28. The submissions from Mr. Costello stress the phrase “all interests concerned” in s. 39 (1)(b) which reads as follows: -

“Every broadcaster shall ensure that—

(a) all news broadcast by the broadcaster is reported and presented in an objective and impartial manner and without any expression of the broadcaster’s own views,

(b) the broadcast treatment of current affairs, including matters which are either of public controversy or the subject of current public debate, is fair to **all interests**

concerned . . .” [emphasis added]

In other words, Mr. Costello in seeking a declaration requires the statutory duty issue to be determined by a court.

Rights of affected persons

29. A few judgments were cited in support of the proposition for Mr. Costello that a court should not make any determination affecting a third party or non-party who has not been afforded an opportunity of fair procedures. In *Staunton v. Toyota* [1996] I.L.R.M. 171, the Supreme Court held that a third party joined to the proceedings but who did not participate in the hearing between the plaintiff and the defendant, had a right to be heard in the determination of the liability question before the trial judge and that a failure to hear the third party amounted to a denial of fair procedures.

30. Counsel for Mr. Costello also cited the judgment of MacMenamin J. in *Kilty v. Dunne* [2015] IESC 88 (Unreported, Supreme Court, 7 December 2015) where at para. 22 he observed that an unrepresented party cannot be the subject of an adverse costs order unless such party is on notice of an application for that purpose.

31. The submissions for Mr. Costello also quote the obiter statement of Laffoy J. in *Doyle v. An Garda Síochána* [1999] 1 I.R. 249 at page 262:

“For the court to make a finding of very clear proof of wrongdoing by an identified alleged wrongdoer in proceedings in which the identified alleged wrongdoer is not a party would constitute a breach of one of the fundamental rules of natural justice - *audi alteram partem*. . .”.

Striking out some causes of action

32. During the course of hearing this motion, counsel were requested to revert with submissions on whether the Court in an application to strike out pursuant to its inherent jurisdiction could select the causes of action which are bound to fail.

33. Counsel for RTÉ cited *D.K. v A.K.* [1993] I.L.R.M. 710 where Costello J., having set out the principles on which the court will exercise its inherent jurisdiction to strike out a plaintiff's action went on to say:

“What I am required to consider therefore is whether any of the claims against all or any of the defendants is so clearly unsustainable that I should strike it out”.

34. In reply, counsel for Mr. Costello emphasised that Costello J. in *D.K. v. A.K.* had refused to strike out any of the causes of action and that the nuance put forward for RTÉ does not mean that if one cause of action is more unsustainable than the other that the rather hopeless cause of action should be struck out.

35. More significantly, objection is taken on behalf of Mr. Costello to the continuous amending nature of the application before the Court. Originally it was a motion seeking to strike out pursuant to the Rules of the Superior Courts and the inherent jurisdiction of the entire proceedings. Now, according to counsel for Mr. Costello, RTÉ seeks to amend its hand by seeking a lesser relief which was never sought in the notice of motion and was raised only in reply.

Decision

Abuse of process

36. The onus rests on RTÉ to establish that these proceedings are bound to fail and that it would be an abuse of process for Mr. Costello to prosecute these proceedings. One of the principal aims of the abuse of process jurisdiction is to enable the court to deal with problems to which the rules either provide unsatisfactory solutions or fail to address altogether. In England, Lord Bingham CJ explained in *Hunter v Chief Constable of West Midlands* [1982] A.C. 529; [1981] 3 All E.R. 727 at 729 that abuse of process consists in “using [the court’s] process for a purpose or in a way significantly different from its ordinary and proper use.”

37. The height of RTÉ's position at this stage is that one or other of the causes of action against RTÉ outlined in the statement of claim do not exist in law or that no cause has been identified which can gain Mr. Costello by pursuing RTÉ. It is not alleged that Mr. Costello has some improper motive in prosecuting the proceedings. Moreover, RTÉ does not claim that it will incur irrevocable damage if Mr. Costello is allowed to proceed. Further it is not disputed that he has a legitimate interest in the reliefs claimed against each of the defendants.

Barry v. Buckley

38. Over 40 years ago now, Costello J. in *Barry v. Buckley* [1981] 1 I.R. 306 at p. 308 referred to the:

“...proper exercise of [the court's] discretion to strike out proceedings whose continued existence cannot be justified and is manifestly causing irrevocable damage to a defendant”

39. There, the plaintiff who did not have a signed contract for the purchase of the land in question issued a plenary summons and registered a *lis pendens* affecting the defendant's interest in the land. Costello J., after referring to the equivalent of O. 19 (28) of the Rules of the Superior Courts (not relied upon by RTÉ now) stated that:

“the Court [also] has an inherent jurisdiction to stay proceedings, and on applications made to exercise it, the Court is not limited to the parties' pleadings but is free to hear evidence on affidavit relating to the issues in the case: (See: *Wyllie*, "The Supreme Court of Judicature (Ireland) Act, 1877" 1906 pages 34 to 37, and "The Supreme Court Practice, 1979" at paragraph 18/19/10). The principles on which it exercises this jurisdiction are well established - basically its jurisdiction exists to ensure that an abuse of the process of the Courts does not take place. So, if the proceedings are frivolous or vexatious they will be stayed. They will also be stayed if

it is clear that the Plaintiff's claim must fail (per, Buckley L. J., *Goodson v Grierson* 1908 1 K.B. 761, at 765).

This jurisdiction should of course be exercised sparingly and only in clear cases. But it is one which enables the Court to avoid injustice particularly in cases whose outcome depends on the interpretation of a contract or agreed correspondence. If having considered the documents the Court is satisfied that the Plaintiffs case must fail, then it would be a proper exercise of its discretion to strike out proceedings whose continued existence cannot be justified and which are manifestly causing irrevocable damage to a Defendant. Having done so the Court can also order that the *lis pendens* be vacated. (As to the application of the *Lis Pendens* Act 1867 to Ireland see *Flynn v Buckley*, the Supreme Court, 24th April 1980 IR 423 (unreported) which overruled *Giles v Brady* 1974 I.R. 462).

The Court's jurisdiction to act as I have just indicated was exercised by Mr. Justice McWilliam in *Kelly v. Kinneen and others* (High Court 29th April 1980 (unreported)). In a somewhat analogous situation in *Tiverton v. Wear Well Ltd.* [1975] CH 146, the court was asked on an interlocutory motion to vacate a caution registered in the Land Registry by a Plaintiff in a specific performance suit, the Court's power to deal with the matter in a summary way was explained by the Master of the Rolls (Lord Denning) at p. 156 as follows:

"The entry of a caution casts a dark shadow on the property. It paralyses dealings in it. No one will buy the property under such a cloud ... I know that the rules of court do not prescribe any summary procedure such as Order 14 does for judgment or Order 86 for specific performance. But that is no obstacle. These courts are masters of their own procedures and can do what is right even though it is not contained in the rules . . ."

Costello J. was satisfied of the plaintiff's abuse when he registered a *lis pendens* on the same day as he issued the plenary summons based on a contract which did not exist.

Sparing use

40. The inherent jurisdiction to dismiss proceedings should be used sparingly. McCarthy J. in *Sun Fat Chan v. Osseous Ltd.* [1992] 1 I.R. 425 at 428 cautioned:

“Experience has shown that the trial of an action will identify a variety of circumstances perhaps not entirely contemplated at earlier stages in the proceedings; often times it may appear that the facts are clear and established but the trial itself will disclose a different picture”.

Jurisdiction and power

41. Formulating principles to capture the shifting nature of the inherent jurisdiction or power of the court has been widely discussed. Jacob in “The Inherent Jurisdiction of the Court” (1970) 23, *Current Legal Problems* 23, described the inherent jurisdiction of courts as “so amorphous and ubiquitous and so pervasive in its operation that it seems to defy the challenge to determine its quality and to establish its limits”.

42. Joan Donnelly in “Inherent Jurisdiction and Inherent Powers of Irish Courts” *Judicial Studies Institute Journal* 2009: 2 p. 122 – 161 rightly concluded that:

“It is vital that judges distinguish between inherent jurisdiction and inherent powers, and be aware of the respective juridical foundations of the two concepts. The conflation of the two terms has impacted on the exercise of curial function warping judges' perception of the true contours of their substantive and procedural powers”.

43. The Court could see the benefit of exercising its power to give directions for the determination of issues. However, it is most reluctant to embark on extending an established inherent jurisdiction to dismiss proceedings where there are provisions in statute and in the RSC available to parties to narrow or eliminate issues of fact or law prior to a trial itself. In *Barry v. Buckley*, there was an overriding sense of abuse caused by the registration of a *lis pendens* which depended on the issue of a plenary summons that referred to an alleged contract which was non-existent. In the application before this Court now, there is no point advanced on behalf of RTÉ that it would be disadvantaged other than having to incur the expense of defending what it regards as claims which are bound to fail.

Existing means to apply for a pre-trial dismissal

44. The following is a non-exhaustive list of ways presented by statute or by the RSC to dismiss, strike out, stay or put conditions on the prosecution of proceedings before trial:

- 1) O. 19 (27) of the RSC allows for an application to be made at any stage of the proceedings for an order to strike out or amend any matter in any pleading “. . . which may be unnecessary or scandalous, or which may tend to prejudice, embarrass or delay the fair trial of the action; . . .”
- 2) O. 19 (28) of the RSC provides for an application to strike out, stay or dismiss any pleading on the grounds that it discloses no reasonable cause of action;
- 3) O. 25 of the RSC allows for the trial of a point of law before the plenary trial itself;
- 4) O. 29 of the RSC enables the court to make orders directing that security for costs be furnished by a plaintiff before proceedings may continue. It is noteworthy that a satisfactory affidavit from a defendant about its “defence upon the merits” is required where the application is made on the grounds that the plaintiff is outside the jurisdiction;

- 5) O. 31 (21) of the RSC provides for the dismissal of an action for want of prosecution if there is failure to answer interrogatories, make discovery or to provide inspection.
- 6) O. 34 (2) of the RSC provides for questions of law to be decided before any evidence is given;
- 7) O. 35 of the RSC enables parties to agree on issues of fact to be tried before judgment;
- 8) O. 36 (7) of the RSC permits a court to direct a trial of any question of fact or partly of fact and partly of law.
- 9) O. 36 (12) (6) of the RSC enables a defendant to apply for the dismissal of an action where the plaintiff fails to serve a notice of trial.
- 10) In the context of personal injury litigation, s. 9 (3) of the Civil Liability and Courts Act 2004 requires courts to ensure compliance with the rules of court by making “. . . such orders as to payment of costs as it considers appropriate”. The court can also refuse to make orders directing that a defence be delivered where a verifying affidavit has not been served in accordance with s. 14 of the Civil Liability and Courts Act 2004.
- 11) A similar regime exists for defamation actions by virtue of s. 8 (10) of the Defamation Act 2009.

Extending the inherent jurisdiction of the Court as established previously in the common law, should only be done in exceptional circumstances when the type of statutory regime described above is open to litigants.

“Servant of justice not its master”

45. This Court recognises that there are instances where statutes or the RSC do not provide for the efficient administration of justice. An example is where Kelly J. granted summary

judgment for part of a claim in *Abbey International Finance Limited v. Point Ireland Helicopters* [2012] IEHC 374; [2012] 2 I.R. 694 in the absence of a specific power to do so in plenary proceedings. Kelly J. notably commented at para. 23 that: “The rules of court are the servants of justice, not its master”.

46. I do not find a deficit in the RSC to facilitate an application to dismiss by RTÉ later in the course of the prosecution of these proceedings. It is worth repeating that RTÉ has not identified any prejudice which it will suffer, such as was found to exist in *Barry v. Buckley* by the registration of a *lis pendens*.

47. The various causes of action in the statement of claim delivered on behalf of Mr. Costello have been scrutinised by RTÉ before it has delivered its defence. Effectively RTÉ is attempting to try preliminary points where Mr. Costello has no obligation to verify or elaborate his claims further at this stage of the proceedings without RTÉ invoking relevant provisions of the RSC.

48. In the event that the approach which I have taken to the revised application on behalf of RTÉ in the opening of the application and during the hearing of its motion is found wanting in some way, I comment as neutrally as possible (without any binding effect on another judge who may hear applications in these proceedings) on the challenges put forward by RTÉ to the various causes of action outlined in the statement of claim which are directed to RTÉ only:

- (1) Implying constitutional justice in the contract, representations or warranties as alleged by Mr. Costello is potentially stateable in view of the authorities relied upon by his counsel in this application;
- (2) It remains for a trial judge to determine whether the statutory duty relied upon by Mr. Costello in the circumstances allows him to seek a declaration (the Court notes that O. 19 (29) of the RSC provides that “No action or pleading shall be

open to objection on the ground that a merely declaratory judgment or order is sought...”);

- (3) It is not be open to the Court at this stage of the proceedings to adjudicate upon the liability of any of the defendants for their alleged failure to provide for the vindication of the plaintiff’s good name and reputation.

Order

49. In the circumstances, the Court refuses the application made on behalf of RTÉ. As RTÉ has been unsuccessful in its application, the costs of Mr. Costello in opposing the application to be adjudicated in default of agreement normally follow that event. However, RTÉ is entitled to make submissions in this regard. Therefore, the orders will not be made until the later of three weeks from the date of delivery of this judgement electronically or the consideration by the Court of written submissions from each of the parties on the orders which may now be made. For the sake of clarity, I am not now making an order for the costs of the application. However, the Court has indicated what will happen in three weeks if RTÉ does not file and serve written submissions. Mr. Costello will have three weeks to file and serve any written submissions in reply. The parties are requested to specify in their submissions if they request an oral hearing and to identify any agreement on proposed terms of the entire order to be made.

Solicitors for the plaintiff/respondent: Ferrys Solicitors

Solicitors for the first named defendant/applicant: RTÉ Solicitors Office

Counsel for the plaintiff/respondent: Conor Power SC and Barry Mansfield BL

Counsel for the first named defendant/applicant: Cian Ferriter SC and Mark Dunne SC