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| *Judgment: approved by the court for handing down (subject to editorial corrections)** | *Delivered:* **11/06/2024** |

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**KING'S BENCH DIVISION**

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**2021/52390**

**Between:**

**ROBIN SWANN**

**Plaintiff**

**and**

**GEORGE IVAN MORRISON**

**Defendant**

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**2021/69147**

**Between:**

**GEORGE IVAN MORRISON**

**Plaintiff**

**and**

**ROBIN SWANN**
**and**
**DEPARTMENT OF HEALTH**

**Defendants**

_____

**David Ringland KC with Hugh McMahon (instructed by WP Tweed & Co, Solicitors) for the Plaintiff in 2021/52390**
**Gavin Miller KC with Peter Hopkins KC (instructed by Mills Selig, Solicitors) for the Defendant in 2021/52390 and for the Plaintiff in 2021/69147**
**David Dunlop KC with Fiona Fee KC (instructed by the Departmental Solicitor's Office) for the Defendants in 2021/69147**

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**COLTON J**

*Introduction*

[1] For the purposes of this judgment the action 2021/52390 shall be referred to as the ("Swann action") and action 2021/69147 shall be referred to as ("the Morrison action.")

[2] In this judgment references to ("the plaintiff") and ("the defendant") are to the parties in the Swann action unless otherwise stated.

[3] On 30 June 2021 the plaintiff issued proceedings against the defendant seeking damages for:

(i) Slander in respect of words spoken by the defendant at an event at the Europa Hotel on 10 June 2021.

(ii) Slander in respect of words spoken by the defendant to the Sunday Life Newspaper on or about 11 June 2021.

(iii) Libel in respect of words published by the defendant on YouTube on 14 and 15 June 2021 entitled respectively ("For Clarity") and ("For Clarity Part II.")

[4] At the time of the publications complained of, the plaintiff was the Minister of Health for Northern Ireland. The defendant is a well-known musician and recording artist.

[5] The plaintiff complains about the following words spoken or published by the defendant.

[6] On 10 June 2021, before an audience at the Europa Hotel, the defendant said the following:

> "Robin Swann has got all the power; he is keeping us in this for over 15 months. All I have to say is, if I don't have any power, my power is like extremely limited, if at all, Robin Swann has got all the power, so I say, Robin Swann is very dangerous, Robin Swann is very dangerous, Robin Swann is very dangerous … Robin Swann is extremely, extremely dangerous …"

[7] On 11 June 2021, in response to a question posed by a journalist employed by the Sunday Life Newspaper, the defendant was alleged to have said:

> "No, I don't regret it. Of course he is dangerous. He is a fraud. Why should I regret it? He called me dangerous and I'm calling him dangerous."

[8] On 14 June 2021, the defendant published or caused to be published on YouTube a video entitled "For Clarity" that contained the following words alleged to be defamatory of the plaintiff:

> "OK starting here, this is called "the reason why Robin Swann is dangerous", is what this video is about.
>
> I released these songs. It was aimed at the UK government; the songs were related to the UK government. I am a UK citizen, I live in the UK, work in the UK, pay my taxes in the UK. So I put these songs out and this Robin Swann character, he decided he wanted to get mixed up in my business. So, he contacted an American Music Magazine called Rolling Stone. I think he wanted to be in the music industry or to be famous or whatever it was, which is very strange for to contact an American rock magazine when the words were UK centric. They were against the UK government, they were anti-UK government lockdown, that's what the songs are about. That is what I was about, that is what my campaign was about, and I was promoting getting live music back.
>
> So, Robin Swann decided to get mixed up in my business which is the music business, he went to an American music magazine and did an interview where he made derogatory comments about myself. So, having got himself mixed up in my business, I decided to have a look at him and, um, the reason why I am saying he is dangerous is, I give you some, some clues as to why I am saying he is dangerous. And this is specifically to do with Northern Ireland, specifically about Northern Ireland I'm speaking.
>
> He has too much control over our lives and jobs, he has too much control over running people's lives and means of support, too much control over the medical conditions as far as like hospitals and people seeing loved ones and people getting operations they can't get etc etc etc. I understand that, it has come to my attention, that he is not a scientist and he is not any kind of medical expert. Well, that came to my attention early on in this game."

[9] On 15 June 2021, the defendant published a video on YouTube entitled "For Clarity Part II" that contained the following words alleged to be defamatory of the plaintiff:

> "OK, this is about why Robin Swann is dangerous Part II.
>
> … They're songs, freedom of expression, poetic licence and so I put these songs out and like I say, this Robin Swann character inserted himself into my life and my job. I don't think that Robin Swann or any of his advisers do listen to my songs, probably not. At this point it doesn't matter. So anyway, Robin Swann decided to bring America into the story, for whatever reason. He wrote a piece for Rolling Stone magazine in the US. Rolling Stone magazine probably would not care one iota, they don't give a damn about what is going on in Northern Ireland, they couldn't care less what was going on in Northern Ireland. In fact, Rolling Stone magazine could not find Northern Ireland on a map, they couldn't find it on a map, so why would they be bothered with this, I don't, you know, I'm asking these questions. So anyway, the only thing I can come up with is that Robin Swann wanted to be in the music business, or he wanted to be famous, or some of his cohorts wanted to be in the music business or Robin Swann wanted to get fame of of making derogatory comments about myself.
>
> It doesn't make any sense why Robin Swann brought America into it.
>
> … so, the other thing is, this is also about breaking all of this all down. I have been asking for 15 months for the evidence, so far, after 15 months there has been no evidence whatsoever coming from Robin Swann. So, I would ask another question, is Robin Swann a conspiracy theorist?
>
> Why are musicians losing work? Why many musicians starving? Because of Robin Swann and his stance on this and his knowledge that he does not have. He does not have this knowledge. How can he make an assessment when he doesn't have this knowledge? Isn't that a conspiracy to make an assessment when you do not have the knowledge?

> OK, well, this is Part II of why Robin Swann is dangerous …"

[10] On 1 September 2021, the plaintiff in the Morrison action issued proceedings against Robin Swann claiming damages for libel in respect of words published in the article in Rolling Stone magazine on 21 September 2020.

[11] On 1 March 2022, the proceedings were amended to include the Department of Health as a second defendant in that action. The article is the one referred to by the defendant in the plaintiff's action.

[12] The article was published on or around 21 September 2020 under the headline "Northern Ireland's Health Minister would like a word with Van Morrison."

[13] The article contained the following words:

> "… Some of what he is saying is actually dangerous. It could encourage people to not take Coronavirus seriously. If you see it all as a big conspiracy, then you are less likely to follow the vital public health advice that keeps you and others safe.
>
> … it is entirely right and proper to debate and question policies.
>
> But Van Morrison is going way beyond raising questions. He is singing about "fascist bullies" and claiming Governments are deceiving people and wanting to "enslave."
>
> It is actually a smear on all those involved in the public health response to a virus that has taken lives on a massive scale. His words will give great comfort to the conspiracy theorists – the tin foil hat brigade who crusade against masks and vaccines and think this is all a huge global plot to remove freedoms.
>
> Only a few years ago, Van said:
>
> > 'I'm apolitical. I have nothing to say about politics whatsoever.'
>
> He has changed his tune big time since then. He could have chosen to sing about how we can all help save lives. He could have written a tribute to our health and social care workers on the front line.

> There are also so many things in the world to sing protest songs about, like poverty, starvation, injustice, racism, violence, austerity – there is a long list.
>
> Instead, he has chosen to attack attempts to protect the old and vulnerable in our society.
>
> It is all bizarre and irresponsible. I only hope no one takes him seriously. He is no guru, no teacher."

***The application***

[14] The plaintiff brings an application for:

(i) An order, pursuant to Order 4 rule 5 of the Rules of the Court of Judicature (Northern Ireland) 1980:

  (a) that the above-entitled action be tried consecutively with the Morrison action; and

  (b) that the Swann action be tried first.

(ii) In the alternative, an order pursuant to Order 4 rule 5 of the Rules of the Court of Judicature (Northern Ireland) 1980, that the Swann action be tried at the same time as the Morrison action.

(iii) An order pursuant to Order 20 rule 5 of the Rules of the Court of Judicature (Northern Ireland) 1980 granting leave to the plaintiff to amend his amended reply to the defendant's defence.

[15] The order sought in (iii) is not opposed and the court, accordingly, granted the order sought.

[16] In the course of oral argument, Mr Ringland indicated that the plaintiff's preferred course of action was that sought in (ii) above.

[17] The application is opposed by the defendant.

[18] The defendants in the Morrison action also oppose the application. It is contended by them that both actions should be heard by separate juries at different times but that the Swann action should proceed first and be determined before the Morrison action.

***Background in relation to the progress of the actions***

[19] Before considering the application it is useful to set out some further detail in relation to the progress of the proceedings in the actions.

[20] In the Swann action the pleadings proceeded in the normal way with the most recent pleading being replies to the defendant's notice for further and better particulars on 27 May 2022.

[21] In relation to the Morrison action, the most recent pleading was an amended defence served on 5 January 2024. The previous defence had been served on 24 May 2022 and a reply to that defence was served on 1 June 2022. There were no further pleadings between 1 June 2022 and 5 January 2024.

[22] On 16 February 2022, the plaintiff in the Swann action made an application for trial by judge alone.

[23] In the Morrison action, the defendants brought a similar application for trial by judge alone on 1 June 2022.

[24] On 29 June 2022, Mr Justice McAlinden provided an ex-tempore ruling granting the applications for trial by judge alone.

[25] Morrison appealed the ruling. The Court of Appeal in a judgment delivered on 28 March 2023 allowed the appeal and set aside the order made by Mr Justice McAlinden. The Court of Appeal only addressed the question of whether the actions should be tried by judge alone. It noted that issues relating to sequencing and consolidation had yet to be determined.

[26] After setting the Morrison action down for trial the case was listed for review before the King's Bench judge on 5 December 2023.

[27] On that date, the judge gave various directions in relation to the action and directed that it be listed for trial by jury for seven days in September/October 2024 (to be agreed with the court). A date of 30 September 2024 was subsequently agreed. The defendants in that action consented to the listing of the case.

[28] On learning of these directions the plaintiff's solicitors complained that unlike the previous reviews in these actions they were not informed of the review on 5 December 2023. They requested an immediate review of the Swann action, and this was arranged for 19 January 2024.

[29] Prior to the review on 19 January 2024, the plaintiff submitted draft directions for consideration by the parties and the court.

[30] The directions proposed that the two actions should be heard one after the other pursuant to Order 4 rule 5 of the Rules of the Court of Judicature (Northern Ireland) 1980 and that the Swann action should be heard first, followed by the Morrison action. It was proposed that the action should be tried by the same judge and jury.

[31] The defendant did not agree to these proposals. At the review the King's Bench judge directed that the plaintiff should make a formal application under Order 4 rule 5 and that the parties should agree a timetable for the hearing of such an application.

[32] This application was issued on 15 March 2024 and the parties agreed a timetable for submission of papers etc and the hearing was listed for 31 May 2024.

***RCJ Order 4 rule 5***

[33] RCJ Order 4 rule 5 provides:

> "5-(1) Where two or more causes or matters are pending in the same Division, and it appears to the Court—
>
> (a) that some common question of law or fact arises in both or all of them, or
>
> (b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions, or
>
> (c) that for some other reason it is desirable to make an order under this rule,
>
> the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them.
>
> 5-(2) Where the Court makes an order under paragraph (1) that two or more causes or matters are to be tried at the same time but no order is made for those causes or matters to be consolidated, then a party to one or more of those causes or matters may be treated as if he were a party to any other of those causes or matters for the purpose of making an order for costs against him or in his favour."

*A summary of the parties' arguments*

[34] Mr Ringland, on behalf of the plaintiff complains, with justification, that throughout the conduct of these proceedings all the parties, through their legal representatives, have proceeded on the basis that these actions would be heard together in some shape or form. He makes good this submission by reference to various correspondence, averments and judicial observations.

[35] Thus, on 24 February 2022, the defendant's solicitors wrote to the plaintiff's solicitors in respect of the plaintiff's application for trial by judge alone.

[36] That correspondence concluded with the following:

> "As you will be aware, our client has issued proceedings against Mr Swann, but the writ has not yet been served. It is clear that once served, the matters should be heard together and, therefore, any directions will need to incorporate progress in those proceedings."

[37] In similar vein, in the affidavit sworn by the defendant's solicitors on 15 March 2022, in response to the application for trial by judge alone the following averment is made at para [6(h)]:

> "As indicated at previous reviews, the defendant is of the view that both these actions should be dealt with together by the court. However, I do not agree that this means determination of those matters should be by a judge rather than jury ..."

[38] The averment at 6(h) was a direct response to para 10(h) of the plaintiff's solicitor's affidavit supporting the application for trial by judge alone. Para 10(h) averred:

> "the defendant has indicated the possibility of serving the writ that has been issued on the plaintiff and thereafter applying that the cases should be heard at the same time or consecutively. The plaintiff is likely to object to any such application, inter alia, on the grounds that it would give rise to undesirable delay. However, in the event that the defendant does ultimately proceed with his claim against the plaintiff, it would be appropriate for the cases to be determined by the same Tribunal, ie, a judge …"

[39] In her affidavit in response to the defendant's application for trial by judge alone in the Morrison action sworn on 8 June 2022, she avers at para 17(g):

> "Whilst a matter on which the plaintiff's counsel will make submissions, I do not accept that any jury's responsibilities would have to be confined to just one of the actions. No evidential/factual basis is advanced for this suggestion, which is in any event an issue of civil procedure for the court. Had this action been pursued as a counterclaim in the other action (as the plaintiff would have been entitled to do), then a single jury would have determined both the claim and the counterclaim. As occurred in the substantially more complex and recent high profile libel proceedings in Virginia involving Mr Depp and Ms Heard. As set out above the same factual matters underpin both actions, and the publication by the defendants in this action is central to Sir Van's defence to the claims made in the other action. Therefore, I do not believe there is any reason why the same jury cannot or should not determine the claims in both these actions. And I believe there is every reason why it should do so in the interests of efficiency and consistency of decision making."

[40] Consistent with this approach, in the skeleton argument signed by counsel on behalf of Morrison in support of his opposition to trial by judge alone, the following is set out:

> "53. As set out in Hunt 2 at paragraph [17(g)] [348], the respondents say there is no reason why these actions cannot be heard together, by the same jury, with appropriate case management directions. As noted at para [27] above, the actions arise out of essentially the same facts; namely, the Rolling Stone article leading to the subsequent publications by the respondent. The respondent has confidence that this honourable court would appropriately case manage such trials with a jury in each.
>
> 54. More importantly, however, the applicants' raising of this issue in this context (the determination and motive for trying these actions) is misconceived. Each application must be considered and determined by reference to a postulated trial of that action (ie that action alone). This is clear from

> the wording of s.62(2). The statute contains no suggestion that a litigant in one action can be denied their presumptive right to jury trial in that action because there may be a related action or actions in which they assert the same right, which may efficiently (as a matter of case management) be tried at the same time as, or in sequence with, the trial in that action. In such a situation the mode of trial determination in each action (assuming a party asserts the right to jury trial in each case) may bear upon how the cases are to be case managed to trial thereafter. But to assume outcomes of the application for a judge only trial in each action (ie if they both fail) and then use that as an argument for a different outcome in those applications (ie that they should both succeed) is illogical/wrong in principle, as well as being contrary to the wording of the statute. The applicants are putting the cart before the horse here. The case management decisions will be taken in light of the separate outcomes of the two judge only applications."

[41] I intervene to say that this was the point which resulted in the Court of Appeal overturning the decision of McAlinden J.

[42] Prior to the review on 5 December 2023, the actions had been reviewed together.

[43] Mr Ringland indicates that when the question of trial by judge alone was argued before Mr Justice McAlinden, all counsel agreed that ultimately some form of consolidation would be appropriate.

[44] In this context Mr Ringland argues that the court should not endorse what he says are the belated and unexplained changes of stance of both Mr Miller on behalf of Morrison and Mr Dunlop on behalf of Swann and the Department of Health in the Morrison action. He asks what is the explanation for the volte face?

[45] That issue is addressed in para 17 of the affidavit of Morrison's solicitor in opposing this application. She avers:

> "17. Whilst I previously stated that these actions should be dealt with together by the court (in correspondence in my first affidavit), I was not asserting that both actions should be tried together. Indeed, at the time of my first affidavit (and at the time of our correspondence of

> 24 February 2022) the question of mode of trial was outstanding and in *Morrison v Swann and DoH* the Statement of Claim had not even been served. As such, I could not, and was not intending to definitively assert how the trials of these two actions should eventually be heard."

[46] On this issue, Mr Miller refers back to the explanation at para 17 of his client's solicitor's affidavit. Importantly, he draws attention to the averment that in February 2022, the Statement of Claim had not even been served in the Morrison action. He says that the court now is in a position to come to its own conclusion on the appropriateness of the order sought in light of the completed pleadings from which the issues of fact and law can be clearly identified.

[47] Returning to the substance of the application, Mr Ringland refers again to various averments/arguments of the legal representatives for Morrison.

[48] Thus, in para 17 of the affidavit of 8 June 2022 it is averred by Morrison's solicitors that:

> "… I simply observe that the factual background to both of these sets of proceedings falls under a very small compass. They arise, essentially out of, one event in September 2020, being the publication of the article, and three events in the (sic) within a few days of each other in the summer of 2021 (the Europa Hotel events, and a brief exchange between the plaintiff and a journalist and two short videos published on YouTube in the days following). There is no evidence to suggest that the case will involve more than a handful of witnesses or any substantial documentation. The plaintiff does not anticipate advancing his cases in the two sets of proceedings in a way that would involve any substantial quantity of witness or documentary evidence. There is no need, on the face of the pleadings, for any scientific evidence, nor would I expect there to be, …"

[49] Referring back to para 53 of the skeleton argument before McAlinden J in relation to the jury trial issue, the defendant's lawyers say that they arise out of essentially the same facts: namely the Rolling Stone article leading to the subsequent publications by the respondent. Mr Ringland emphasises the words "essentially the same facts" and "leading to."

[50] In the same skeleton argument it is said at para 62 that:

> "… These actions originate with organs of the state (namely a government Minister and his Department) publishing an article in a US based global magazine attacking the respondent for exercising his right to criticise the government leading to the respondent publishing certain comments about that government Minister. …"

[51] Again, Mr Ringland emphasises "leading to."

[52] The issue of the existence of common questions of law/fact is, Mr Ringland argues, clear from the ex tempore judgment of McAlinden J.

[53] In his judgment, he stated:

> "The second action in this case, in relation to the defence or defences raised by George Ivan Morrison, it is quite clear that the facts of the second action are in the defence clearly linked to the events that gave rise to the first action. They are inexplicably bound together (sic – presumably inextricably) and although no formal application had been made under Order 4 rule 5 in respect of consolidation or quasi-consolidation, it is the court's view, and it is for the court to make that determination, either on the application of a party or on its own initiation. This court having considered the pleadings in both cases is of the view, that at some stage, the issue of an order under Order 4 rule 5 will have to be made by the court either in the form of full consolidation or quasi-consolidation but there is one thing for sure is that these two actions cannot be dealt with in isolation. It would be inappropriate and contrary to the interests of justice to do so."
>
> [I have underlined the words emphasised by Mr Ringland in his submissions.]

[54] Mr Miller counters by saying that the views expressed by McAlinden J are not as unequivocal as the plaintiff suggests. Thus, the judge said "whether any specific order is required" and that "at some stage serious consideration will have to be given to the making of a form of consolidation order or quasi-consolidation …"

[55] It is argued on behalf of the plaintiff that there are numerous common factual issues in the actions relating to, for example, the defendant's campaign for live music, the pandemic, the lyrics and meaning of the defendant's "protest songs", the public health response to the pandemic, the effective measures taken to protect

public health in general and of the music industry in particular, the role of the plaintiff as Minister for Health, the Department of Health and the circumstances of the publication of the Rolling Stone article and its meaning. It is argued that most of the background and context is common to both actions. The events interconnect and interact and are part of a single story.

[56] Mr Ringland summarises the arguments in favour of making the order sought in the following way:

(a) There are common questions of fact.

(b) It would avoid the risk of inconsistent findings in respect of the meaning of the Rolling Stone article.

(c) It will save time and costs and avoid duplication of effort and energies.

(d) It would avoid witnesses having to attend two separate trials. Both the plaintiff and the defendant are likely to have very considerable demands on their time.

(e) It would ensure a final adjudication of all issues in the action of a single or consecutive hearing.

(f) It will ensure that no party gains a litigation advantage to the detriment of the other, which is a significant consideration given the history of the actions.

(g) It will preserve as level a playing field as possible and provide a measure of fairness to all parties.

(h) It would ensure that justice is administered between the parties with the highest degree of accuracy, expedition and as economically as possible.

[57] The previous views expressed by the parties may well be revealing but ultimately it is a matter for this court to determine whether the grounds for the relief sought are met. That determination is to be founded on the current pleaded issues in both actions, the contents of the alleged slander/libel and any discoverable documents available to the court.

[58] As per the judgment of McCloskey J in *Ulster Bank/Taggarts litigation* [2013] NIQB 54 the primary and narrow issue for the court to consider is that of common questions of fact and/or law.

[59] In this regard Mr Miller argues on behalf of the defendant that no such common questions of fact and/or law exist so as to justify the order sought by the plaintiff.

[60] Mr Miller draws the court's attention to the pleaded issues in the two actions.

[61] In the Morrison action, the defendant pleads justification (*Lucas-Box* meaning) and/or if defamatory, the words complained of were honest comment on a matter of public interest. In the amended reply the plaintiff says that no honest comment is available because the words were spoken maliciously.

[62] In the Swann action there are a total of four slanders/libels alleged in the Statement of Claim.

[63] The amended defence pleads a variety of defences to each of the four allegations.

[64] In summary, reliance is placed on a privilege defence based on a reply to attack. Further reliance is placed on a defence that the words spoken were honest comment on a matter of public interest to include possibly section 6 of the Defamation Act (Northern Ireland) 1955.

[65] In the amended reply to defence the plaintiff (Swann) pleads no reply to attack and no honest comment defences are available because the words were spoken maliciously.

[66] Mr Miller argues that on a proper analysis of the pleadings there are no common issues of law and fact. He argues that the issues of fact and law in each action are entirely distinct. This is because the two cases involve different publications on different dates.

[67] In Morrison v Swann and DoH, he argues that the defence of justification and honest comment on a matter of public interest are questions of law. The jury in the Morrison action will not have to determine that issue in relation to the Rolling Stone article. He accepts that the jury in the Swann action will be taken to the Rolling Stone article and questions will arise in relation to its wording and the role it played in the events/publications of June 2021. However, he argues that the jury will not have to determine the meaning of that article or whether it was defamatory of Morrison to decide on liability and quantum (and the various defences) in the Swann action.

[68] He rejects the suggestion that the Swann action should be heard first, simply because proceedings were issued in that case before the issuing of proceedings in the Morrison action.

[69] He points out that in contrast to the plaintiff in the Morrison action, the plaintiff in the Swann action took no action to progress his case following the Court of Appeal decision. The plaintiff in the Morrison action has taken steps to progress his action with directions being given and a trial date now listed for 30 September

2024. Thus, the defendant's position is that the status quo should be preserved. To do otherwise would be unfair to the plaintiff in the Morrison action.

[70] The Morrison action is a short "one publication" libel case. Any verdicts in that action will be res judicata and binding on the plaintiff and the defendant in this action. It is argued that this avoids the alleged risk of inconsistent verdicts should the actions be tried separately. The example is given that it would not be inconsistent for a jury to find no liability for defamation in the Morrison action, but equally to find the reply to attack defence is made out by the defendant in this action.

***Consideration***

[71] What then are the common questions of fact and law, if any, that arise in both actions?

[72] In my view this turns on the issue of the Rolling Stone article. The jury in the Morrison action will have to determine whether the alternative meaning pleaded in the defence is made out or alternatively whether the words complained of were honest comment on a matter of public interest. Essentially, that is a matter of law. However, in determining that issue it will have to consider factual issues relating to the defendant's role as Minister in informing the public with information on the Coronavirus and disseminating ways in which the public can keep safe. It will need to consider the "Save Live Music" campaign launched by the defendant and whether what the defendant said about these matters is "actually dangerous."

[73] True it is, that the jury in this action will not formally have to decide whether the plaintiff was defamed in the Rolling Stone article, but it will have to consider these factual matters, in particular, in assessing the "reply to attack" defence.

[74] It seems to the court that the publication of the Rolling Stone article which is the basis of the Morrison action is clearly linked to the alleged slanders and libel in this action. In assessing the extent to which those slanders and libels were defamatory and, more importantly, whether the defences of qualified privilege based on reply to attack and honest comments on matters of public interest are made out will involve the juries in both cases assessing the meaning of the Rolling Stone article, whether it was justified, whether it was honest comment on a matter of public interest in determining both the defendant's defence in this action and his claim for defamation in the Morrison action. The publication of the Rolling Stone article is a prominent feature of the Morrison defence in the Swann action. As per the affidavit referred to at para [39] above, the Rolling Stone publication "is central to" Morrison's defence in the Swann action. The alleged defamatory publications in the Swann action are replete with references to the Rolling Stone article.

[75] Further, it appears to the court, that the assessment of those issues in both actions will primarily be determined on the same evidence.

[76] In the Morrison action counsel for Swann will inevitably cross-examine Morrison as to why he only issued his proceedings after the proceedings in Swann. Inevitably, the Rolling Stone article will have to be considered by the jury in the Swann action. Therefore, the jury hearing each action will know about the other proceedings. In order to avoid confusion and to ensure that the jury fully understands the issue raised it would be preferable, in my view, for the same jury, or Tribunal of fact, to deal with all issues. The court acknowledges that there is a risk of confusion if one jury hears both actions at the same time but equally there is a risk of confusion if a jury hears one action but is aware of the other action without fully understanding all the details of the separate action. Better, in my view, to have one jury or Tribunal of fact determining all the issues.

[77] Therefore, it seems to the court that there are common issues of law and fact in these actions.

[78] The matter does not end there.

[79] In exercising its discretionary powers to grant the relief sought, the court also must take into account what McCloskey J described in *Ulster Bank v Taggarts Litigation* as:

> "The various principles and criteria enshrined in the overriding objective in Order 1, rule 1A. The overriding objective, in one sentence, enjoins the court to conduct and manage cases in a manner which best confronts and minimises undue delay, cost and complexity …"

[80] On this broader issue and also bearing in mind the provision of Order 4 rule 5(1)(c) which provides:

> "That for some other reason it is desirable to make an order under this rule."

The court considers that they point in the direction of granting the order sought, that is an order that the actions be heard together.

[81] In this regard the court takes into account the following matters. Both actions involve the parties Morrison and Swann. So far as the court can evaluate, the evidence in both cases is likely to overlap significantly, notwithstanding that the cases involve separate slanders/libels. For each party to stand over their respective pleadings it seems likely that essentially the same evidence will be given in both actions. Hearing both actions together will significantly reduce the costs of these actions. True it is, that hearing the actions together will add a further layer of complexity to this action, but even with the additional time, it will still in the court's

assessment, be shorter and will reduce the amount of costs expended. In short, again referring to the words of Mr Justice McCloskey:

> "Joinder of these actions is likely to save time and costs; will avoid duplication of effort and energies; will secure from the court a single adjudication of all the issues belonging to the dispute among the parties; will ensure that no party gains a litigation advantage to the possible detriment of another; will preserve as level a playing field as possible; and will provide an equal measure of fairness to all parties."

The court also considers that the possibility of resolution of this dispute is enhanced if both actions are heard together. In this regard, the court notes that the alleged defamatory publications are now of some vintage. As a result, it is arguable that the actions are now stale.

[82] There is no doubt that this action is complex. It involves four separate publications which will require separate consideration. The defences are complicated because they involve mixed questions of fact and law which will require careful delineation between the roles of the judge and jury. Joining the actions together will add to this complexity.

[83] Indeed, I digress to express the opinion that the actions would be better dealt with by way of judge alone, although I accept that under the applicable law at the time of the publications, the defendant is entitled to trial by a jury.

[84] The matter is further complicated by the fact that Swann has separate representation in each action. However, I do not consider that this will provide an insurmountable difficulty for the running of the cases together. The court can ensure that any cross-examination of Morrison is conducted to avoid duplication by counsel and that counsel will focus on the specific issues relevant to the particular action in which they appear. Similar considerations apply when Swann gives his evidence-in-chief.

[85] In terms of the running of the actions heard together, I take the view that the Morrison action should be opened first. It seems to me that this is the logical way to approach the hearing of the cases. It was the Rolling Stone publication which in effect, triggered the subsequent alleged slanders/libels by Morrison. I do not agree that simply because Swann issued proceedings first that that should be the first case to proceed. Of course, Swann will be perfectly entitled to raise the issues he has in relation to the timing of the Morrison action to invite any adverse inferences he wishes the jury to draw.

[86] In deciding that the cases should be heard together, I am conscious of the fact that the plaintiff in the Morrison action has progressed his case and has obtained a

listing date. I am told by Mr Ringland that it ought to be possible for this action to be ready for hearing by 30 September 2024, and this is an important matter in my consideration.

[87] I note the position of Swann and the Department of Health in the Morrison action. They do not consent or agree that both actions should be heard at the same time. It seems to be based on the suggestion that the Department, as a public body, should await the outcome of the Swann action so as to limit public funds being incurred in dealing with a libel action if the protagonists who may be described as Swann and Morrison can deal with their dispute in the first instance. They, therefore, argue that the Swann case should proceed first, and then, at some later date (if necessary) the Morrison case could be heard before a different jury. I reject this submission. Based on the analysis set out already in this judgment, I consider that both actions should be heard together. To adopt the approach suggested would, in my view, be unfair to Morrison in his action.

[88] In the course of submissions, Mr Dunlop on behalf of Swann and the DoH, in the Morrison action, states that they are not in a position to proceed to trial in September 2024 because of their understanding that it was "a jointly understood and agreed position" that the actions would not be listed pending the determination of this summons.

[89] Understandably, this is strongly contested by Morrison.

[90] If any party wishes to make an application to adjourn the hearing on 30 September 2024, then it should do so forthwith. The court, however, notes that this action has been listed since December 2023. Pleadings in the action have been closed for a number of years. On the face of it, the court can see no reason why the parties should not be in a position to deal with this matter and any outstanding discovery prior to 30 September 2024.

***The empanelling of a jury***

[91] The defendant raises the issue as to whether it is possible for a single jury to be empanelled to hear two actions together. The court needs to consider the background to, intention underlying and the language of both section 64 of the Judicature (Northern Ireland) Act 1978 ("the 1978 Act") and the Juries (Northern Ireland) Order 1996 ("the Juries Order").

[92] Section 64 of the 1978 Act provides in relation to juries in civil actions:

> "(i) The jury for the trial in the High Court of any action or any issue therein shall consist of seven persons."

[93] Article 12(1) of the Juries Order, which regulates the empanelling of both criminal and civil juries provides:

> "12.-(1) The jury to try any issue shall be selected by ballot in open court from the panel, or a section of the panel, of persons summoned to attend for jury service at the time and place in question.
>
> (2) Without prejudice to Article 18, the jurors whose numbers are selected by ballot shall, subject to all just challenges and objections, be the jurors to try the issues for which they are summoned.
>
> (3) Subject to any statutory provision, where a jury has tried, or been selected to try, an issue, the court, with the consent of both parties to any other issue, may —
>
> (a) try that other issue with that jury; or
>
> (b) set aside any member of that jury whom the parties' consent to withdraw or who is justly challenged or is excused by the court and, another member having been selected by ballot, try that other issue with the jury as so reconstituted;
>
> and the powers conferred by this paragraph may be exercised so long as any issue remains to be tried."

[94] The predecessor to Article 12 of the Juries Order was section 41 of the Juries Act (Ireland) 1871 which regulated the balloting of those summoned to form a jury to try both civil and criminal trials.

[95] The objective was to empanel the jury to try the issue being the issue … brought on to be tried … between the parties.

[96] Mr Miller suggests that these provisions mean that in Northern Ireland the court cannot provide for a jury empanelled to try one action, then go on to try another different action.

[97] The term "issue" is not defined in the Juries Order. It seems to the court reasonable to conclude that the reference to "issue" in the Juries Order relates to the lis or case to be tried. Article 12 refers to "any issue" and that the jurors who are selected shall be the jurors to try the issues for which they are summoned.

[98] Broadly, there are three potential orders that can be made under Order 4. The court could order full consolidation of these actions which would involve

amalgamation of the pleadings into a plaintiff/counterclaim scenario. Full consolidation is not practical in these actions at this stage.

[99] Alternatively, the court could order that the two actions be heard consecutively. This was the initial primary order sought by the plaintiff. On reflection Mr Ringland argued that the appropriate order in this case would be the third possibility, namely that the two actions be heard at the same time by a single jury.

[100] In the first scenario, no difficultly would arise in relation to the interpretation of the Juries Order and the 1978 Act.

[101] The second scenario would be problematic.

[102] It seems to the court that the third scenario is permissible under the Juries Order and the 1978 Act. The effect of the order under Order 4 means that the issues for which the jurors are summoned are the issues in the two actions now to be heard together.

[103] The White Book, in addressing the equivalent (and not materially different) provision in the Juries Act 1974 which applies in England & Wales, asserts at para 4/9/2 that:

> "Where consolidation must be refused for one reason or another, an order will often be made that one action shall follow the other in the same list and be heard before the same judge (or the same judge and jury). In this way common witnesses are saved the expense of two attendances, and the judge would be in the position to try the action in such order as may be convenient or even at the same time."

This certainly suggests the authors consider no issue arises when a consolidation order has been made.

[104] Therefore, whilst it is correct that the court should exercise caution, I consider that the order that these actions be heard together permits the court to empanel one jury to deal with both actions at the same time, and to give verdicts in respect of the issues that arise in the actions.

***Conclusion***

[105] The court, therefore, directs:

(i) The plaintiff is granted leave pursuant to Order 20 rule 5 of the Rules of the Court of Judicature (Northern Ireland) 1980 to amend his amended reply to the defendant's defence.

(ii) The "Swann action" and the "Morrison action" shall be tried at the same time before a jury pursuant to Order 4 rule 5 of the Rules of the Court of Judicature (Northern Ireland) 1980.

(iii) The actions shall be heard together on 30 September 2024. The Morrison action should be opened first.

(iv) The actions shall be listed for review on a date to be agreed between the parties in early September 2024.