THE HIGH COURT

(redacted judgment) delivered 3/6/15

[2015/3350P]

BETWEEN

DENIS O'BRIEN

PLAINTIFF

AND

RADIÓ TELEFIS ÉIREANN

DEFENDANT

[2015/3364P]

BETWEEN

IRISH BANK RESOLUTION CORPORATION LTD

(IN SPECIAL LIQUIDATION)

PLAINTIFF

AND

RADIÓ TELEFIS ÉIREANN

DEFENDANT

JUDGMENT of Mr. Justice Binchy delivered on the 21st day of May , 2015

The Proceedings

1. These two sets of proceedings above arise out of the same factual background. In his proceedings, Mr. O'Brien seeks, *inter alia*, an injunction restraining the defendant from making any use whatsoever (and in particular from making publication) of information falling within the categories of documents described in the plenary summons. These categories are as follows:

A. Any confidential documentation or information identifying or tending to identify or providing details of or relating to the plaintiff's personal banking arrangements with Irish Bank Resolution Corporation Ltd. ("IBRC");

B. Any confidential documentation or information identifying or tending to identify or providing details of or relating to any transactions on the plaintiff's personal accounts with IBRC;

C. Any confidential documentation or information identifying or tending to identify or providing details of or relating to the terms of the plaintiff's personal facilities with IBRC; and

D. Any confidential documentation or information identifying or tending to identify the plaintiffs negotiations with IBRC regarding the terms of his personal facilities.

2. In its proceedings, IBRC seeks, *inter alia*, an injunction restraining the defendant from publishing or broadcasting any communications or information exchanged between the plaintiff and Mr. O'Brien in the course of their banker/customer relationship. Furthermore, IBRC seeks an injunction restraining the defendant from publishing or broadcasting any legal advice received by or given to the plaintiff concerning or arising from its banker/customer relationship with Mr. O'Brien. In the course of the proceedings, counsel for the defendant, Mr. Holland SC, did not dispute that any documentation or information comprising legal advice is subject to legal professional privilege and that that privilege is absolute.

3. In each case, the plaintiffs seek an order directing the defendant to deliver up to each of the plaintiffs all documentation in its possession arising out of the banker/customer relationship between IBRC and Mr. O'Brien and as more particularly described, in the case of Mr. O'Brien, all documentation described in and

of the categories set out above. IBRC further seeks the delivery of all documents recording or indicating the fact or content of any legal advice received by or given to IBRC concerning or arising from its banker/customer relationship with Mr. O'Brien.

4. On 28th April, 2015, the defendant wrote to each of the plaintiffs requesting certain information concerning a debt due by Mr. O'Brien to IBRC. The letter, from a Ms. Pamela Fraher, researcher, stated that she had seen a letter of October 2013 from Mr. O'Brien to IBRC in which he claimed to have had an agreement with the previous management of IBRC to repay the outstanding balance of his loans over a three year period, as opposed to a one year period previously agreed. Ms. Fraher informed Mr. O'Brien and IBRC that she was working on a news report in relation to that request and that in the defendants' report it was intended to state that Mr. O'Brien had sought an extension of the repayment period of his loan, that this was agreed with IBRC management at the time, in particular Mr. Mike Aynsley, and that Mr. O'Brien or his companies benefited financially from these arrangements. Each letter then addressed a series of questions to each of the addressees which overlapped but are not identical in each case. However, it is not necessary for the purpose of these proceedings to set out those questions in full, not least because replies were not delivered by either plaintiff to the letters received by them from the defendant. Instead, each of the plaintiffs' solicitors replied to the defendant protesting that whatever documentation it had in its possession relating to their respective clients, that may have come into the possession of the defendant, had been received unlawfully and without the consent of the plaintiffs, and requesting the delivery of all such documentation to the solicitors for the plaintiffs. In addition, the solicitors for Mr. O'Brien asserted that the disclosure of the information and documentation to the defendant was a breach of Mr. O'Brien's rights to privacy and confidentiality and that any further breach by the defendant

could not be justified by any countervailing public interest in disclosure. Mr. O'Brien's solicitors requested the defendant to undertake not to disclose any private and confidential information in relation to their client by a specified date. The defendant declined to comply with these requests and as a result of which the plaintiffs have issued these proceedings. Mr. O'Brien's proceedings were issued on the 30th April, 2015 and on the same date he issued a Notice of Motion seeking interlocutory relief, substantially in the terms of the relief claimed in the Plenary Summons. IBRC's motion was issued on 1st May, 2015 and on the same date it also issued a Motion seeking relief substantially in the terms of its Plenary Summons.

5. The application for an interlocutory injunction in each case came on for hearing before this Court on the 12th May, 2015 and concluded on 15th May, 2015. At the outset of the hearing, the Court heard an application made on behalf of counsel for Mr. O'Brien to restrict the reporting of these proceedings pending their determination. This application was made on the grounds that otherwise such reportage as would follow would render the application for injunctive relief moot. The defendant, recognised the sense of this application and while not consenting to it, did not robustly oppose it. In any event an order restricting (but not prohibiting) reportage of the proceedings was made on terms agreed between the parties.

The Affidavits

Affidavits in the O'Brien Proceedings

6. In his first affidavit grounding his proceedings, Mr. O'Brien complains that the defendant has come into possession of confidential information relating to Mr. O'Brien's personal banking arrangements with IBRC, without his authority, or the authority of anybody acting on his behalf, and in breach of his constitutional and legally protected rights to privacy and confidence. He asserts that if the Court permits

the disclosure of this information he will suffer irreparable harm both personally and financially in terms of his personal business and financial affairs. Specifically, he avers in paragraph 18 of his affidavit of 30th April, 2015 as follows:

> "I have extensive dealings with national and international institutions. My dealings with these institutions are confidential not only to me but also to the various institutions. To put it bluntly, I say and believe that these institutions would not like to see details of how they deal with customers such as me disclosed to the public domain. A belief on the part of these institutions that such eventuality was a possibility and that accordingly details of their dealings with their customers in relation to personal, private and confidential information would enter the public domain, would, I believe, impact on their willingness to engage and deal with me in relation to my personal, private and confidential banking arrangements. Whilst this is something I know to be correct, it is unlikely that I would ever be able to prove that this was the reason that a particular financial institution refused to deal with me either at all, or in a way they would deal with someone not exposed to a similar threat of disclosure. This is the very real incalculable and irreparable loss that I will suffer if this honourable Court permits the unauthorised disclosure of my private and confidential banking information by the defendant."

6. He goes on to say that the defendant has advanced no public interest to displace the confidentiality which exists as a matter of law between he, Mr. O'Brien, and his bankers.

7. In the context of an application for interlocutory relief, he avers that the defendant will suffer no loss and at most will suffer a change to the contents of its intended broadcast or a change to its broadcasting schedule. He says he knows of no

current imperative in broadcasting the information sought to be broadcast and that in any event the defendant could be adequately compensated by an award of damages for any change to the content of its intended broadcast and/or change in broadcasting schedule.

8. In a replying affidavit filed on behalf of the defendant dated 7th May, 2015, Mr. David Murphy, Business Editor with the defendant, states as follows:

Paragraph 3:

"I am currently working on a short news report, which, *inter alia*, examines efforts by the plaintiff, in 2012/2013, to seek an extension of repayment period of loans he had with the Irish Bank Resolution Corporation (IBRC) formerly Anglo Irish Bank. The focus of the report is not so much on the personal finances of the plaintiff as on the governance of IBRC and how it was that a major debtor such as the plaintiff was in a position after the liquation of IBRC commenced to seek an extension of time on his facilities on foot of a alleged verbal agreement with the former CEO of IBRC allegedly made prior to the commencement of the liquidation. I beg to refer to a proposed script of the report upon which marked with the letters "DM1" I signed my name prior to the swearing hereof."

Paragraph 8:

"However, RTE does assert that the dealings between the plaintiff and the former management of IBRC and between the plaintiff and the liquidators of IBRC are matters of legitimate and public interest outweighing the acknowledged interest of the plaintiff and the bank in the confidentiality of their business relationship – such that no interlocutory relief should be granted."

9. Mr. Murphy then sets out in paragraph 9 a detailed summary of Mr. O'Brien's business and other activities, philanthropic activities following which he states in paragraph 10:

> "Accordingly I respectfully say that the plaintiff plays and has for many years played a significant role in the State's business life and its public life and while his rights to privacy and confidence are to be respected, nonetheless he is a person of whom it can be said that his affairs are of legitimate and public interest– particularly were they interact with the State interest and were they have financial implications for the State. He has been, in so far as relevant to these proceedings, a very major debtor to the State in the form of IBRC. He is, it is suggested in the category of businessman whose positions lay them open to close scrutiny by the press."

10. In paragraph 11 of this affidavit, Mr. Murphy sets out a detailed history of the establishment of IBRC and the investment of the State therein. He refers to the relationship framework established pursuant to Section 3 of the Anglo Irish Bank Corporation Act 2009, by the Minister of Finance which identified the objectives of the Minister of Finance under the Act as including the following:

1. To minimise cost and other risk to the exchequer and the taxpayer;
2. To remedy a serious disturbance in the Irish economy by helping to restore the reputation and enhance the stability of the financial system in the State and;
3. To ensure that the bank operates in accordance with the public interest.

11. He goes on to deal with the passing of legislation by order of February 2013 to give effect to the special liquidation of IBRC and sets out the recitals of that order, including recital (ix) which states:

> "And whereas in the achievement of the winding up of IBRC the common good may require permanent or temporary interference with the rights, including property rights, of persons."

12. In paragraph 12 of his affidavit he states:

> "I say and believe that the history recorded above, albeit briefly, demonstrates that the affairs of IBRC, both before and after its liquidation have involved huge financial investment by and risk to the State and are matters of very significant public interest. An element of that public interest relates to the manner in which IBRC, both before and after its liquidation has dealt with substantial debtors."

13. In paragraphs 13-18 of his affidavit Mr. Murphy refers to the contents of documents released under the Freedom of Information Act 2014 which he claims demonstrate controversy as to the governance of IBRC. He refers in particular to a departmental briefing note prepared for a meeting between the Minister for Finance and the Chairman/CEO of IBRC scheduled to be held on 25th July, 2012 which, *inter alia*:

1. Refers to a "continuing lack of regard for the views of the Department and Minister by senior management in IBRC".
2. Records concern at the relationship between the CEO and a named major debtor (not Mr. O'Brien)
3. States "we are concerned at the large number of transactions that have been poorly executed under the direction of the current CEO.

> The performance of management in executing these transactions raises the question of the effectiveness of the CEO. The poor management displayed ... along with the increased level of public concern and political and media scrutiny that they command is damaging the creditability of the institution and by extension of the State".

14. A speaking note attached to the briefing note records the extreme dissatisfaction of the Minister/Department with the performance of IBRC management.

15. Mr. Murphy also exhibits the minutes of the meeting that subsequently took place. These minutes record the concerns of the Minister about the governance of the bank and in particular rumours of close relationships between senior management at the bank and large clients. The minutes record that the CEO of the bank acknowledged that there were close relationships with large clients but asserted that these relationships were not inappropriate. The CEO represented that "the clients are managed to ensure a maximum return on all loans" and he confirmed a strong but not inappropriate relationship with Mr. O'Brien.

16. Mr. Murphy also referred to the sale of Siteserv which has given rise to recent controversy and as a result of which the special liquidators of IBRC have been requested to review transactions involving the writing off of debts due to IBRC in excess of €10 million. However, Mr. Murphy emphasised that it is no part of the defendants concern in this matter to assert any wrongdoing by anyone and in particular Mr. O'Brien, in relation to the sale of Siteserv. Mr. Murphy states that the issue is only relevant as a public controversy as to the governance of IBRC in circumstances in which dealings between Mr. O'Brien and IBRC raised concerns as

to governance of IBRC in terms similar to those articulated by the Department of Finance.

17. Mr. Murphy then goes on to deal in some considerable detail with the contents of documents received by the defendant in connection with Mr. O'Brien's borrowings from IBRC. Mr. Murphy refers to facilities advanced to Mr. O'Brien which he states had operated in accordance with their terms until He states that at some point prior to the appointment of the liquidators Mr. O'Brien had discussions with the then Chief Executive of IBRC, Mr. Mike Aynsley, and Senior Executive, Richard Woodhouse with a view to extending the repayment period of his facilities. He states that Mr. O'Brien subsequently asserted to the special liquidator that he had an agreement with Mr. Aynsley and Mr. Woodhouse to extend the repayment period by three years and, Mr. Murphy avers, that such an agreement would have conveyed a significant benefit on Mr. O'Brien.

18. Mr. Murphy goes on to state [redacted] that he understands that former management of IBRC deny that their discussions with Mr. O'Brien resulted in an agreement. Furthermore he states that they did not have any approval for such an agreement by any credit committee or the board of IBRC.

[redacted]

20. Mr. Murphy submits, in paragraph 27 of his affidavit, that the question of the alleged verbal agreement between Mr. O'Brien and IBRC is a matter which ought

to be brought into the public domain for a number of reasons which are detailed in the affidavit as follows:

(a)"it amounts to an assertion by the plaintiff that senior IBRC management, before the liquidation, dealt with a borrower (himself) who owed hundreds of millions of euro, in effect to the State, on the basis of unrecorded verbal agreements to the extension of loan repayment periods

(b) it amounts to an assertion by the plaintiff that senior IBRC management, by the verbal agreement, conferred a significant benefit on him;

(c) it amounts to an assertion by the plaintiff that senior IBRC management made such an agreement without credit committee or similar approval;

(d) it amounts to an assertion by the plaintiff that senior IBRC management had failed to inform IBRC generally, and the liquidators on their appointment, of such unrecorded agreement;

(e) in summary, it amounts to an assertion by the plaintiff that, while the agreement was, from his point of view, proper as he was entitled to pursue his own interest in the matter, senior IBRC management had made an agreement with him in respect of over €300 million of debt which was, from IBRC's point of view, very likely highly irregular;

(f) such assertions are made against a backdrop of recorded concern by the Department of Finance as to:

- management by senior IBRC management of relationships with major IBRC borrowers/clients;
- dissatisfaction with the performance of senior IBRC management *inter alia,* as to large transactions;

- reputational damage to the State arising out of the foregoing."

21. There is no allegation whatsoever of any misconduct or wrongdoing on the part of Mr. O'Brien (on the contrary, it is acknowledged that Mr. O'Brien was entitled to pursue his own interests as he did.)

22. The next section of Mr. Murphy's affidavit deals with Mr. O'Brien's relationship with IBRC post the special liquidation. It deals with Mr. O'Brien's correspondence with IBRC in regard to the extension of the repayment period of his loan. It then goes on to deal with the considerations given by IBRC to the request and to the suggestion that there was a pre-liquidation agreement in regard to the same and also refers to legal advice received by IBRC. Again there is no allegation of any sort of misconduct on the part of Mr. O'Brien.

23. Mr. Murphy's affidavit concludes with some further observation under the heading of the "public interest". It is asserted that Mr. O'Brien's dealings with IBRC are per se a matter of legitimate public interest because of the size of the debt, his financial power, and the fact that he has purchased assets from IBRC and his role in Irish life as earlier described in the affidavit. Mr. Murphy asserts that the public has an interest in knowing information about the relationship between IBRC and its principle customers in circumstances where the bank has been "bailed out by the public, the debts of the bank have been taken by the people of Ireland and the bank was run at the direction of or by persons appointed by the Minister of Finance".

24. In paragraph 46 of his affidavit, Mr. Murphy sums up in one sentence his arguments that the public interest requires disclosure: "it is the prudent management of one of the bank's key clients is being called into question – as is whether the taxpayers interests were best served".

Affidavit of Denis O'Brien 11th May, 2015

25. In this affidavit Mr. O'Brien replies to the affidavit of David Murphy of 7th May, 2015. He notes that the defendant does not dispute that the information which Mr. O'Brien seeks to protect is confidential and that the defendant acknowledges that there has been no wrongdoing on the part of Mr. O'Brien. He objects to what he describes as the disregard of his constitutional and contractual rights because of an interest in matters deriving from a state owned entity, IBRC. He argues that based on this rationale, any persons' dealings with entities such as IBRC, the Revenue Commissioners, the Department of Social Protection etc. would be "fair game" for the media. And he says that if this is denied by the defendant, then it is clear that he is to be distinguished simply because of his public profile.

26. He expresses concern that the averments of Mr. Murphy at paragraph 6 and paragraph 19 of his affidavit suggest that the defendant is in possession of confidential information beyond that which had previously been revealed. He goes on to address what he says are a number of factual inaccuracies in Mr. Murphy's affidavit. In particular he says that his loan was performing and there is no evidence that there was any expectation that the loan would not be repaid in full; moreover he says that he has paid interest and principal and was fully compliant with the covenants relating to his loan when many debtors were not. He denies that he ever threatened any legal action against IBRC or that he ever suggested that the credit committee could or should be bypassed.

27. He goes on to say in circumstances were the information sought to be disclosed is acknowledged to be confidential, and where there is no suggestion of wrongdoing on his part, it is clear that the defendant is seeking to use information confidential to Mr. O'Brien to try to promote its story. He concludes by saying that if he is unsuccessful in this application, his personal private confidential banking affairs

will be "fair game" to the media at large and he will be placed in an invidiously unique position as far as his private life is concerned as compared to other citizens of this country.

Affidavit of Marcus John Sewell Trench dated 11th May, 2015

28. This affidavit was procured by Mr. O'Brien to demonstrate the financial harm that will be caused to him if he is unsuccessful in his application to restrain publication of his confidential information. Mr. Trench sets out his very significant experience in the commercial banking sector in a career spanning more than forty years. He spent many years working with HSBC. He worked in that bank's corporate recovery unit assisting with the management of many ailing UK industrial groups and in the 1990s he was given responsibility for the management of a specialised property lending unit managing many of the bank's large property and construction industry exposures. Subsequently he joined a regional associate of the HSBC group, British Arab Commercial Bank, initially as head of internal audit and compliance and subsequently he set up the bank's risk management function. Since March 2010 he has worked as a senior associate with two London based risk management and training consultancy firms and has acted as an expert witness in several high profile banking cases. In early 2014 he joined the Board of the Bank of Beirut (UK) Ltd. as an independent non-executive director. Accordingly Mr. Trench may, on the strength of his affidavit, be regarded as an appropriate expert to deal with the matters to which he disposes in his affidavit. He also deposed that he had not had any previous connections or dealings with Mr. O'Brien.

29. He recites that he has had sight of Mr. O'Brien's grounding affidavit and the replying affidavit of Mr. Murphy. He refers to the duty of confidentiality between a

bank and its customers and the importance of same. In the context of the potential disclosure of Mr. O'Brien's affairs as proposed by the defendant he says:

30. "Despite the fact that the defendant confirms that Mr. O'Brien has not engaged in any wrongdoing, I believe the mere fact of disclosure of Mr. O'Brien's personal, private and confidential banking information by the defendant is likely to be sufficient to damage Mr. O'Brien's banking reputation as a customer, significantly undermine Mr. O'Brien's relationship with his bankers and impact on the terms of credit available to Mr. O'Brien."

31. Since it is of some importance to this application I will quote in full from the remainder of his affidavit:

Paragraph 12:

"Given that non financial information, including reputation, forms a vital part of the assessment of a borrower's suitability and of the terms and conditions that would apply, it is my view that lending institutions would not like to see details of how they deal with customers such as Mr. O'Brien disclosed in the public domain. A belief on the part of these institutions that such eventuality was a possibility with a particular customer and that details of their dealings with that customer could be prone to disclosure, would, I believe, firstly, impact on their willingness to engage and deal with Mr. O'Brien in relation to his personal, private and confidential banking arrangements but, secondly, and more concerning, impact on the terms of credit available to Mr. O'Brien."

Paragraph 13:

"Furthermore, implicit in the banker-customer relationship is mutual trust and respect. Any customer is entitled to seek to negotiate terms of lending. The disclosure of Mr. O'Brien's personal, private and confidential banking

information to the numerous financial institutions and other private lenders, financial intermediaries, investment banks and security firms with which Mr. O'Brien regularly deals could seriously undermine Mr. O'Brien's bargaining position with these entities who may seek to impose stricter terms (having the benefit of the disclosure of this information) as well as eroding mutual trust and respect built up over decades."

Paragraph 14:

"These are very real, incalculable and irreparable losses that I believe Mr. O'Brien is very likely to suffer if the defendant discloses Mr. O'Brien's personal, private and confidential banking information. I also believe that it would be impossible for Mr. O'Brien to prove that a bank's or a financial institution's reluctance to deal with him or the imposition of terms less favourable than there might otherwise be, was attributable to the bank's concerns about the disclosure of confidential information relation to Mr. O'Brien."

Second Affidavit of Mr. David Murphy

32. By affidavit of 11th May, 2015, Mr. Murphy replied to the second affidavit of Mr. O'Brien and the affidavit of Mr. Trench. In relation to the affidavit of Mr. Trench, Mr. Murphy makes the point that the public interest in question in these proceedings is specific to the affairs of IBRC against the backdrop not merely of State ownership but also the circumstances in which it came in to being and the part it and its antecedent banks played in national affairs. For this reason, Mr. Murphy does not consider that other banks who may be approached by Mr. O'Brien for facilities should have any real concern that his engagement with them would be subject to the same

public interest and consequent risk of disclosure of information, as arises in the case of IBRC.

33. Mr. Murphy also makes the point that Mr. Trench ignores that there are circumstances in which, to a greater or lesser degree, confidential banking arrangements are disclosed to third parties. He argues that in the ordinary course of business a borrower may be required to provide details of indebtedness to other banks. He also points to the fact that discovery of bank accounts is common place in litigation.

34. And finally, in so far as Mr. Trench's affidavit is concerned, Mr. Murphy makes the point that it is hard to understand how the position of Mr. O'Brien's loans in 2012/2013 could seriously undermine Mr. O'Brien's bargaining position now, since it is very likely that the position in relation to such loans will have substantially altered in the meantime.

35. Mr. Murphy then goes on to address the issues raised by Mr. O'Brien in his second affidavit. In this part of the affidavit he states that he does not suggest that, as to any extended periods of the loans, Mr. O'Brien did not pay interest in the ordinary way; he does suggest however that Mr. O'Brien agitated for a extension of the period of the loans which would have conferred on Mr. O'Brien a significant benefit. He says that if such an agreement was made without credit committee approval, that is not a criticism of Mr. O'Brien but identifies a significant issue of corporate governance within IBRC.

36. He also says that he understands that former IBRC management assert that their discussions with Mr. O'Brien were conducted on the basis that nothing was agreed until agreed by the HBRC credit committee and that no proposal to extend the period of Mr. O'Brien's loans was agreed or were sent to credit committee on foot of

those discussions. He goes on to say that an internal note in 2013 to the credit committee analysed the issue of the extension of Mr. O'Brien's loan in terms of the risk of his litigating to seek to enforce the alleged agreement.

37. Mr. Murphy does not assert that Mr. O'Brien received any loan write off and nor does he say that the loans will come within the scope of the inquiry recently announced by the Minister for Finance (into loans involving a write off by IBRC of more than €10 million). However he says that Mr. O'Brien did agitate for and may have received the significant benefit of an extension of time within which to pay his loans. He says that the public interest is essentially the same in both cases *i.e.* understanding the past management and governance of IBRC and its relationships and transactions with major debtors.

Affidavits in IBRC Proceedings

Affidavit of Mr. Kieran Wallace 1st May, 2015

38. Mr. Wallace is one of the joint special liquidators of IBRC. In his affidavit of 1st May, 2015 he recites the correspondence referred earlier in this judgment received by him from the defendant and his reply to the defendant. As with Mr. O'Brien, he asserts an entitlement on behalf of IBRC to confidentiality in the information and documentation in the possession of the defendant. He also asserts legal professional privilege over any documentation constituting legal advice as is in the possession of the defendant. This is a grounding affidavit used to support an application by IBRC for injunctive relief and does not go into any of the factual background concerning the relationship between IBRC and Mr. O'Brien.

Replying Affidavit of Mr. David Murphy 7th May, 2015

39. In this affidavit, Mr. Murphy replies in substantively the same terms to Mr. Wallace's affidavit as he did in his replying affidavit to the first affidavit of Mr.

O'Brien dated 7th May, 2015. As such, it is unnecessary to summarise the contents of Mr. Murphy's replying affidavit.

Second Affidavit of Mr. Kieran Wallace 9th May, 2015

40. In this affidavit Mr. Wallace replies to the affidavit of Mr. Murphy of 7th May, 2015. Many of Mr. Wallace's arguments are similar to those made by Mr. O'Brien and to that extent there is no need to repeat the same here. In summary however he states:

(i) The liquidation of IBRC is acknowledged by Mr. Murphy to be proceeding successfully.

(ii) In so far as the Department of Finance was expressing concerns about the corporate governance of IBRC in 2012, none of these concerns relate to Mr. O'Brien.

(iii) It is not uncommon for borrowers to request extension of time to repay loans or, when discussing repayment of existing liabilities, to allege that they have a pre-existing agreement that the repayment terms will be extended.

(iv) While Mr. Murphy describes a claim of a "highly irregular" agreement between the previous CEO and Mr. O'Brien, nothing exhibited by Mr. Murphy supports the assertion of such an agreement.

41. Mr. Wallace expresses great concern that if the bank's entitlement to confidentiality in its dealings with its customers is undermined, this has the potential to damage IBRC in reputation and in financial terms.

Affidavit of Mr. David Murphy, 11th May 2015

42. While Mr. Murphy rebuts the contents of Mr. Wallace's second affidavit, he does not aver to any issues of fact that have not already been addressed in his earlier affidavits or raise any new issues and accordingly I don't propose to summarise the same here.

Background

43. In January 2009, Anglo Irish Bank was nationalised pursuant to the Anglo Irish Bank Corporation Act, 2009. Irish Nationwide Building Society was nationalised in 2011. In July, 2011 Anglo Irish Bank was merged with Irish Nationwide Building Society and the amalgamated entity was named Irish Bank Resolution Corporation. While the Court is unaware as to the precise extent of the investment by the State in IBRC, Anglo Irish Bank or Irish Nationwide Building Society, the affidavit of Mr. David Murphy sworn on behalf of the defendant in each set of proceedings suggests a state investment in all entities of €34.7 billion.

44. In February 2013, the Oireachtas passed the Irish Bank Resolution Corporation Act providing for the special liquidation of IBRC. Amongst other things, the stated objectives of the liquidation is to ensure that the financial support provided by the State to IBRC is, to the extent achievable, recovered as fully and efficiently as possible.

45. Mr. O'Brien is a debtor of IBRC. He is also a businessman of national and international renown with extensive business interests across a wide range of sectors including; international telecoms, radio, media, property, aircraft leasing, golf and other leisure interests. As pointed out by Mr. Murphy in his affidavits of 7th May, Mr. O'Brien has featured in the public spotlight for numerous other reasons including very significant philanthropy, his investment in Celtic Football Club in 2001, his chairing of the Special Olympics in 2002/2003 and his financial contributions to Irish sport.

All of this is set out by Mr. Murphy in his affidavits to the intent of demonstrating Mr. O'Brien's undoubted status as a public figure.

46. On 12th October, 2013, Mr. O'Brien wrote to Mr. Kieran Wallace, Joint Special Liquidator of IBRC, requesting a one year extension of his loan facilities.

The remaining balance however, was substantial. In his letter to Mr. Wallace, Mr. O'Brien maintained that he had an agreement with the previous management that the balance could be repaid over the following years,

The defendant clearly had obtained a copy of this letter from its own sources and in these proceedings the defendant asserts journalistic privilege over the identify of the source of this and other information.

47. It is of some relevance in the context of these proceedings that subsequent to their issue, some of the matters referred to above were mentioned in Dáil Éireann by Deputy Catherine Murphy in a debate in the Dáil about the sale by IBRC of Siteserv, which was of course purchased by a company owned or controlled by Mr. O'Brien. The defendant was at pains to stress in these proceedings that it was not alleging any irregularity on the part of Mr. O'Brien in connection with that transaction or indeed on any other basis. Ms. Murphy stated in the Dáil that:

> "the ultimate buyer of Siteserv was one of the largest debtors of IBRC. His loans had expired and he had apparently written to Kieran Wallace in his role as special liquidator seeking the same terms IBRC had allowed him, which was to pay off his loans in his own time at low interest rates. When a loan

> expires, one expects a penalty to be put onto it, not a discount. My understanding is that it was costing IBRC 7% of its money, significantly higher than the 1% NAMA was borrowing at. Even if Denis O'Brien's loans were eventually paid off in full…."

At this juncture the chairman reminded Deputy Murphy that she had been asked on three previous occasions not to mention names. The significance of Deputy Murphy's comments, for the purpose of these proceedings, is that they put into the public domain some of the very information which the plaintiffs in these proceedings were, at the time of issue of the proceedings, concerned to restrain by court order from coming into the public domain, although it should be pointed out that there are material inaccuracies in her comments. While the plaintiffs accept that they cannot now obtain an order in respect of any information already in the public domain, they still wish to obtain injunctive relief in relation to such information as is not already in the public domain, and which the defendant intends to publish.

48. Mr. Murphy in his replying affidavit exhibits the proposed script of the broadcast which the defendant intends to make concerning these matters. The proposed script divulges information, concerning Mr. O'Brien's dealings with IBRC including; the original amount of his indebtedness to IBRC, the amount repaid by him as of October, 2013 and his request for an extension of the period of repayment of the balance due.

Test for Interlocutory Injunction

49. The ordinary test for the granting of an interlocutory injunction is that set out in the case of *Campus Oil v. Minister for Industry(No.*2) [1983] I.R. 88, the criteria for which are well known. However, it is also settled law that this test does not apply in all circumstances. In particular, in cases involving freedom of expression, it has

been recognised for many years that the test for the granting of an injunction is of a significantly higher standard. So for example, as far back as 1891, Lord Coleridge said in *Bonnard v. Perryman*[1891] 2 Ch 269:-

> "The right of free speech is one which is for the public interest that individuals should possess, and indeed, that they should exercise without impediment so long as no wrongful act is done… until it clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions."

50. That case was endorsed in Ireland by the decision of the Supreme Court in *Sinclair v. Gogarty* [1937] I.R. 377. In more recent times, in the case *of Cogley v Radió Television Éireann* [2005] IEHC 180, Clarke J. explained the rationale as follows:-

> "It should be noted that one of the underlying reasons for the reluctance of the courts in this jurisdiction to grant injunctions at an interlocutory stage in relation to defamation stems from the fact that if the traditional basis for the grant of an interlocutory injunction (i.e. that the plaintiff has established a fair issue to be tried) was sufficient for the granting of an injunction in defamation proceedings, public debate on very many issues would be largely stifled. In a great number of publications or broadcasts which deal with important public issues, persons or bodies will necessarily be criticised. There will frequently be some basis for some such persons or bodies to at least suggest that what is said of them is unfair to the point of being defamatory. If it were necessary only to establish the possibility of such an outcome in order that the publication or broadcast would be restrained, then a disproportionate effect on

the conduct of public debate on issues of importance would occur. In that regard it is important to note that both the Constitution itself and the law generally recognise the need for a vigorous and informed public debate on issues of importance. Thus, the Constitution confers absolute privilege on the debates of Dáil and Seanad Éireann. The form of parliamentary democracy enshrined in the Constitution requires that there be a vigorous and informed debate on issues of importance. Any measures which would impose an excessive or unreasonable interference with the conditions necessary for such debate would require very substantial justification. Thus the reluctance of the Courts in this jurisdiction (and also the European Court on Human Rights) to justify prior restraint save in unusual circumstances and after careful scrutiny."

51. In carrying out the balancing exercise between the interests of the plaintiffs and those of the public he stated:

"I would wish to emphasise that the balancing exercise which I have found that the Court must engage in is not one which would arise at all in circumstances where the underlying information sought to be disclosed was of a significantly private nature and where there was no, or no significant, legitimate public interest in its disclosure. In such a case (for example where the information intended to be disclosed concerned the private life of a public individual in circumstances where there was no significant public interest of a legitimate variety in the material involved), it would seem to me that the normal criteria for the grant of an interlocutory injunction should be applied. In such cases it is likely that the balance of convenience would favour the granting of an interlocutory injunction..." ....

"...however, as I have indicated, where, as here, the information concerned is one which, on its face, appears important to an informed public debate on an issue of significant public importance different criteria, it seems to me, apply."

52. In the particular circumstances of the case, having regard to the very significant public interest involved, Clarke J. declined to grant injunctive relief notwithstanding that the information had been gathered in circumstances which he had found, *prima facie*, to be a trespass and breach of privacy.

53. In *Foley v. Sunday Newspapers Ltd.* [2005] 1 I.R. 88 the plaintiff sought to restrain publication of material which he alleged constituted a real and serious risk to his life and/or bodily integrity. Kelly J. noted that

"over the years since the decision in *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C.396, a number of special categories of cases have been identified where the American Cyanamid guidelines, even if satisfied, do not result in a interlocutory injunction been granted."

He noted that the principle was already well established that in defamation proceedings a Court will not, save in truly exceptional circumstances, impose a prior restraint on publication unless it is clear that no defence will succeed at trial. While he did not think it followed that that meant that an injunction should not be granted in circumstances such as those alleged by the plaintiff in those proceedings, he said that he was satisfied that:

"before an injunction of this type should be granted, the plaintiff would have to demonstrate, by proper evidence, a convincing case to bring about a curtailment of the freedom of expression of the press."

54. In the particular circumstances of the case Kelly J. found that the evidence fell far short of what was required to justify the granting of an injunction.

55. This approach was endorsed by Ms. Justice Irvine in the case of *Michael Murray v. Newsgroup Newspapers Ltd. & Others* [2011] 2 I.R. 156 a case in which the plaintiff, who had been convicted of serious sexual offences in the United Kingdom and in this jurisdiction, was released from prison in 2009. Following his release he was the subject of frequent articles and photographs in the defendants' newspaper. The articles identified the plaintiff, discussed his previous convictions, gave his whereabouts and stated that the Gardai believed that he was at risk of reoffending. The plaintiff, who claimed that he had made significant efforts at rehabilitation, had to resign from voluntary employment and was diagnosed with depression and anxiety. He instituted proceedings seeking injunctive relief and damages for mental pain, distress and anguish caused by interference with his rights under the Constitution and the European Convention on Human Rights, principally his right to privacy and his right to life. The applicant sought interlocutory injunctions prohibiting the newspapers from further publishing photographs of him or from releasing any information in relation to his residence or other information that would enable members of the public to locate him.

56. Irvine J. found that the plaintiff had established a fair question to be tried and that his claim was not frivolous or vexatious. She noted that the rights asserted by the plaintiff, in particular the right to life and the right to privacy, are constitutional rights and are also protected by the European Convention on Human Rights. However, she stated that in cases where freedom of expression is sought to be restricted by an interlocutory order, she was satisfied that the plaintiff was required, as Kelly J. said in *Foley v. Sunday Newspapers Ltd.* [2005] 1 I.R. 88 "to demonstrate, by proper evidence, a convincing case to bring about a curtailment of the freedom of expression of the press." Irvine J. went on to say that;

"In order to demonstrate a "convincing case", or that such prohibition is "likely" to be ordered, the applicant must show that the interference with the freedom of expression sought is justified by one of the recognised exceptions to that right and that the proposed restriction would be proportional to the aim achieved."

57. In the particular circumstances of the case, Irvine J. held that the plaintiff had not adduced sufficient evidence at the interlocutory stage to demonstrate that he was likely to succeed at the trial of the action.

58. Irvine J. in *Murray* also referred to the decision of the Supreme Court in the case of *Mahon and others v. Post Publications Ltd.* [2007] 3 I.R. 338. That case is of considerable importance in relation to the requirements that a plaintiff must meet when applying for a prior restraint of publication. In that case the plaintiffs (who were the members of the tribunal of inquiry into certain planning matters and payments) sought orders restraining the publication or use of information which the Tribunal had circulated on a confidential basis, in advance of public hearings. Fennelly J. stressed the importance of and the fundamental nature of the right to express convictions and opinions and the right to communicate facts or information. He stated that these rights are inseparable and that "the right of a free press to communicate information without let or restraint is intrinsic to a free and democratic society."

59. He went on to note that the right of freedom of expression is not absolute and it may be necessary to reconcile it in the event of conflict with other constitutional rights. He further stated that it may even be restricted or controlled by laws passed for the advancement of other legitimate social purposes. In such cases he said, the Courts have found it useful to have resort to the principle of proportionality.

He cited the judgment of Barrington J. in the case of *Irish Times Ltd. v. Ireland* [1998] 1 I.R. 359 where he stated:

> "the real question is whether the limitation imposed upon the various constitutional rights is proportionate to the purpose which the Oireachtas wished to achieve."

60. Fennelly J. went on to consider Article 10 of the European Convention on Human Rights (the "Convention") and in particular the possibilities for restriction on freedom of expression as set out in Article 10(2). Referring to the text of Article 10(2) of the Convention, he noted that any restriction must, as that provision requires, firstly, be "prescribed by law" and, secondly, be "necessary in a democratic society". It must, as the European Court of Human Rights has said serve "a pressing social need". It must also, of course, serve one of the listed interests.

61. It is apparent therefore that on any application for an interlocutory injunction seeking prior restraint of publication, the requirements of Article 10(2) of the Convention must be addressed, in addition to the normal principles applicable for interlocutory relief. As regards what are the normal principles for interlocutory relief in these circumstances, there appears to be some difference of approach in the test articulated by Clarke J. in *Cogley v. Radió Telfis Éireann* and the test approved by both Kelly J. in *Foley v Sunday Newspapers Ltd.* and Irvine J. in *Murray v. Newsgroup Newspapers Ltd. and others* . The difference relates to cases that Clarke J. identified where the underlying information sought to be disclosed was of a significantly private nature and where there was no, or no significant legitimate public interest in its disclosure. In those cases, Clarke J. suggested that the normal criteria for the grant of an interlocutory injunction should be applied. It may therefore be the case that in such cases it is not necessary to apply the "convincing case" test referred

to by Kelly J. and Irvine J. For reasons that will become apparent later in this judgment, I do not think it is necessary for me to consider that question in this case and I will proceed to address these proceedings on the basis that the "convincing case" test applies, and in the context of Article 10(2) of the Convention.

62. In order to address the "convincing case" test and also the requirements of Article 10(2) of the Convention it is necessary for me to give some consideration to:

1) The rights to confidentiality which the defendant acknowledges that the plaintiffs have in their banking transaction with each other and whether that right is likely to be set aside following a full hearing;

2) The jurisprudence relating to Article 10(2) of the European Convention on Human Rights; and

3) The constitutional rights of the parties.

While I am very mindful of the fact that this is not the full trial of the matter, it is difficult to see how either the convincing case test or Article 10(2) of the Convention can be considered without addressing these matters.

Banking Confidentiality

63. The plaintiffs contend, and it is not disputed by the defendant, that as between banker and client there is a long established implied term of confidentiality. In the leading case of *Tournier v National Provincial and Union Bank of England* [1924] 1 K.B. 461 Atkin LJ (as he then was) stated:

> "I come to the conclusion that one of the implied terms of the contract is that the bank enter into a qualified obligation with their customer to abstain from disclosing information as to his affairs without his consent."

64. He went on to say that this obligation goes beyond the state of the account and extends at least to all the transactions that go through the account, and to the

securities, if any, given in respect of the account and beyond the period when the account is closed or ceases to be active. Bankes LG in the same case stated that:

> "Again the confidence is not confined to the actual state of the customers account. It extends to information derived from the account itself."

65. The existence of this duty and right of confidentiality was confirmed in the Supreme Court by Lynch J. in *National Irish Bank Ltd. v. Radió Telefis Éireann* [1998] 2 I.R. 465 wherein he stated:

> "There is no doubt but that there exists a duty and a right of confidentiality between banker and customer as also exists in many other relationships such as for example doctor and patient and lawyer and client. This duty of confidentiality extends to third parties into whose hands confidential information may come and such third parties can be injuncted to prohibit the disclosure of confidential information. There is a public interest in the maintenance of such confidentiality for the benefit of society at large."

66. More recently, in the case of *McKillen v. Times Newspapers Ltd.* [2013] IEHC 150 MacEochaidh J. stated:

> "The interest in such confidentially extends not only to the parties who enjoy the confidence, but every citizen and resident in the State would like to see such relationships protected. To put it bluntly, no-one would like to see their banking details on the front page of any newspaper and therefore there is a public interesting in protecting and upholding those confidences."

67. Like many rights however, the right is not absolute and may be displaced in certain circumstances where warranted by the public interest. Historically, it was recognised that the public interest would warrant disclosure in cases of wrongdoing or iniquity. The defendant accepted in these proceedings that there was no suggestion of

any wrongdoing or iniquity, actual or contemplated, on the part of Mr. O'Brien. It was also accepted by the parties that the circumstances in which disclosure may be justified embrace a wider range of activities. In *National Irish Bank Ltd. v. Radió Telefis Éireann* [1998] 2 I.R. 465, Shanley J. stated:

> "It would, I believe, be unwise to attempt to define the boundaries of the so called exceptions of public interest and I refrain from doing so other than to observe (as Ungoed-Thomas J. did in *Beloff v Pressdram Ltd.* [1973] 1 All E.R. 241 at p. 260) that:- "...misdeeds of a serious nature and importance to the country" will justify a disclosure on the grounds that such disclosure is invariably in the public interest."

68. That disclosure is permissible in the public interest is not in dispute in these proceedings either, and that is hardly surprising given that there are numerous cases in which disclosure has been ordered notwithstanding the existence of a duty of confidentiality. These include: *Lion Laboratories Ltd. v. Evans* [1985] Q.B. 526, *National Irish Bank Ltd. v. Radió Telefis Éireann* [1998] 2 I.R. 465, and *McKillen v. Times Newspapers Ltd.* [2013] IEHC 150. *Lion Laboratories* is cited as the leading case for the proposition that it is not necessary to establish wrongdoing or iniquity on the part of the plaintiff to permit disclosure, in the public interest, of confidential information. In that case the plaintiffs were manufacturing and marketing a device used in the prosecution of persons accused of driving with an alcoholic concentration above the limit prescribed by law, in circumstances where there was doubt about the accuracy and functioning of that device. The Plaintiffs sought to restrain publication of confidential internal documents that would have revealed these concerns The court held that it would be wrong to refuse leave to publish material that might lead to a reappraisal of a device that had the potential for causing a wrongful conviction of a

serious criminal offence. Stephensen J. said: "...some things are required to be disclosed in the public interest, in which case no confidence can be prayed in aid to keep them secret, and [iniquity] is merely an instance of just cause or excuse for breaking confidence." That case was relied upon by MacEochaidh J. in *McKillen v. Times Newspapers Ltd.* In *McKillen* disclosure of some information was permitted because:

> "Balancing the best I can the competing interests in this case, bearing in mind the weighty importance that is attached to a free press, I have decided in this case to permit a limited amount of publication of the intended information. I say that the '*Sunday Times*' has established that it is a matter of very significant public interest as to how it is that certain parts of the bank conducts its business and the extent to which it might be granting further public monies to one of its large debtors"

69. MacEochaidh J. also stated:

> "On behalf of the *Sunday Times*, what is said to me is that there is a public interest of a real and weighty nature in publishing information about the manner in which the bank in question deals with one of its most significant debtors. Such interest arises in such circumstances where the bank has been bailed out by the public; the debts of the bank have been taken on the shoulders of the Irish people; the bank is run effectively at the direction of or by persons appointed by the Minister of Finance; and the whole of the operation is now, effectively a public interest operation. In those circumstances, there is a particular public interest is knowing certain things about the relationship between the bank and its customers."

70. Accordingly, MacEochaidh J. refused an order restraining the defendant from publishing the fact that IBRC had advanced a further loan to the plaintiff. However, he did make an order restraining publication of other information concerning the plaintiff including information of an opinion nature expressed by officials informally within the bank, and information concerning the commercial relationship between Mr. McKillen and Mr. O'Brien (coincidentally the Plaintiff in these proceedings).The precise nature of the information prohibited from publication in that case is unclear because ,of necessity ,this was redacted from the judgment.

71. It is submitted on behalf of each the plaintiffs that the circumstances in which the public interest will justify disclosure of what is otherwise confidential information are; where the information reveals a matter which is of pressing public concern, serious misconduct (actual or contemplated), or must otherwise be important for safeguarding the public welfare in matters of health and safety. Even then, it is submitted, it will involve a complex weighing exercise which may involve redaction of a large part of the detail of the information as per the *McKillen* case and the case of *London Regional Transport & another v. The Mayor of London & another* [2001] EWCA CIV 1491.

72. On behalf of the defendant, it is submitted that publication of confidential information may be permitted where any public interest is demonstrated. Stressing that no wrongdoing is alleged against either the plaintiff or the liquidators of IBRC, the defendant submits that it seeks, in the public interest, to illuminate issues of governance of IBRC and how it was that a major debtor such as the plaintiff was in a position to seek an extension of his facilities on foot of an alleged verbal agreement with the former CEO of the bank prior to liquidation.

The European Convention on Human Rights Act, 2003.

73. Section 2 of The European Convention on Human Rights Act, 2003 provides that in interpreting and applying any statutory provision or rule of law, a court shall, insofar as possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.

74. Mr. O'Brien seeks to rely on the right to respect for private and family life as provided for in Article 8 of the Convention. Article 8 provides as follows:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

75. Counsel for Mr. O'Brien submits that the Court must conduct a balancing exercise between Article 8 and Article 10 of the Convention, and that the Court is not concerned merely with the exception within Article 10.

76. Article 10 of the Convention deals with freedom of expression. It provides as follows:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers. This article should not prevent States

from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights or others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

77. Accordingly, it can be plainly seen that freedom of expression may be qualified by measures that are prescribed by law, and as are necessary in a democratic society, for preventing the disclosure of information received in confidence.

78. The case of *Fressoz and Roire v. France* (2001) 31 EHRR 28, concerned the rights of the applicants under Article 10 of the Convention. Both applicants were journalists who had published an article relating to the salary of the chairman and managing director of Peugeot, Mr. Calvet. This publication lead to the applicants being charged with offences under French law relating to the handling of copies of notices of assessment of tax obtained through a breach of professional confidence, unlawful removal of deeds and documents, and theft. The applicants were initially acquitted in the Paris Criminal Court, but the public prosecutor appealed and the applicants were convicted in the Paris Court of Appeal of handling photocopies of Mr. Calvet's tax returns which had been obtained through a breach of professional confidence by an unidentified tax official. That decision was in turn appealed to the

Court of Cassation, which upheld the conviction. The applicants brought proceedings before the European Court of Human Rights seeking a declaration, amongst other things, that their rights under Article 10 of the Convention had been violated.

79. In its decision the Court states:

(1)"The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest."

(2)"As a matter of general principle, the "necessity" for any restriction on freedom of expression must be convincingly established. Admittedly, it is in the first place for the national authorities to assess whether there is a "pressing social need" for the restriction and, in making their assessment, they enjoy a certain margin of appreciation. In cases, such as the present one, concerning the press, the national margin of appreciation is circumscribed by the interest of a democratic society in ensuring and maintaining a free press. Similarly that interest will weigh heavily in the balance in determining, as must be done under paragraph 2 of Article 10, whether the restriction was proportionate to the legitimate aim pursued."

(3)"The Court's task in exercising its supervisory function is not to take the place of the national authorities but rather to review under Article 10 the decisions they have taken pursuant to their power of appreciation. In so doing, the Court must look at the "interference" complained of in light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are "relevant and sufficient".

80. The Court noted that the published article did not concern Mr. Calvet's reputation or rights, but the management of the company that he ran. It was of particular significance in the case that the information published was already available to the public, because it was open to local taxpayers to consult a list of people liable for tax in their municipality, which disclosed details of each taxpayer's taxable income and tax liability. The prohibition, leading to conviction, was the publication of the tax assessments. Because the information was already available to the public, the Court found that the information published was not confidential and accordingly there was no over-riding requirement for the information to be protected as such. While the defendant had argued that the publication of the information was necessary to secure the effective preservation of confidentiality, and while the *Court agreed that the objective of protecting fiscal confidentiality is a legitimate objective*, (emphasis added) it found, having weighed all interests in the balance, that there was no reasonable relationship of proportionality between the legitimate aim pursued by the journalists' conviction and the means deployed to achieve that aim given the interest a democratic society has in ensuring and preserving freedom of the press. The Court therefore found a violation of Article 10 of the Convention. It is clear however from a reading of the decision that a significant factor in the Court's finding was the fact that the information which the defendant asserted had been published in breach of an obligation of confidentiality was already in the public domain.

81. In *HRH Prince of Wales v. Associated Newspapers Limited* [2007] 2 All E.R. 139, Lord Phillips in the Court of Appeal in the United Kingdom, in the context of an application for summary judgment by the Prince of Wales, considered the right of the Prince of Wales to assert confidentiality over his private journals which had been copied and delivered to the defendant, by an employee, notwithstanding a

confidentiality clause in her contract of employment. The Court noted that there was an issue in the case as to whether the information disclosed was private so as to engage Article 8 and that there was an obvious overlap between this question and the question of whether the information was capable of being the subject of a duty of confidence under the old law.

82. The Court also noted that information received in confidence may not be of such a nature so as to engage Article 8. For example, a trade secret will not necessarily do so. Thus, the Court noted, the Convention recognises, in Article 10(2), that it may be necessary in a democratic society to give effect to a duty of confidence in the old sense at the expense of freedom of expression.

83. In addressing the question as to whether the content of the journals could be considered private, the Court referred to the case of *Campbell v. MGN Limited* [2004] 2 A.C. 457 where Lord Nicholls stated: "Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy." The Court went on to state that in many cases it will be perfectly obvious that information is both confidential and of a private nature. The Court continued:

> "Whether a publication or a threatened publication involves a breach of a relationship of confidence, an interference with the privacy or both, it is necessary to consider whether those matters justify the interference with article 10 rights that will be involved if the publication is made the subject of a judicial sanction. A balance has to be struck. Where no breach of a confidential relationship is involved, that balance will be between Article 8 and Article 10 rights and will usually involve weighing the nature and

consequences of the breach of privacy against the public interest, if any, in the disclosure of private information."

84. In relation to the documents received in confidence, the Court had this to say:

> "The test to be applied when considering if it is necessary to restrict freedom of expression in order to prevent disclosure of information received in confidence is not simply whether the information is a matter of public interest but whether, in all the circumstances, it is in the public interest that the duty of confidence should be breached. The court will need to consider whether, having regard to the nature of the information and all the relevant circumstances, it is legitimate for the owner of the information to seek to keep it confidential or whether it is in the public interest that the information should be made public."

85. In relation to Article 8 rights, the Court considered that Prince Charles had an unanswerable claim for breach of privacy notwithstanding the importance of Prince Charles as a public figure. The Court concluded by saying that "when the breach of a confidential relationship is added to the breach of privacy, the plaintiff's case was overwhelming."

86. It is important to note that these proceedings concerned an application for summary judgment, post publication of the journals. It may therefore be advanced as authority for the proposition that a court is not confined to considering the issue of proportionality of a restraint upon publication at the full hearing of the matter, but may do so at interlocutory stage.

87. I have quoted extensively from this case because it seems to me that of all the authorities to which the Court was referred in this matter, it involved the most

comprehensive recent review of the law concerning the interplay between the concepts of privacy and confidentiality and Articles 8 and 10 of the Convention. Moreover in my view, the conclusions of the Court of Appeal in the case are, in my view, consistent with the law to date in this jurisdiction in relation to Articles 8 and 10, the established constitutional rights of privacy and freedom of expression (to which I refer below) and the law relating to the protection of confidential relationships. For these reasons therefore I think it is correct to say that the test applied by Lord Phillips also represents a correct statement of the law in this jurisdiction.

The Constitution

88. Freedom of expression is expressly protected by Article 40.6(i) of the Constitution which guarantees the right of citizens to express freely their convictions and opinions. It is not an unqualified right and may, in appropriate cases, have to yield to competing constitutional rights. The Courts have repeatedly guarded the rights protected by Article 40.1 whicl have been copperfastened by Article 10 of the Convention.

89. In *AG v. Paperlink Ltd.* [1984] I.R.L.M. 373 Costello J. held that the "very general and basic human right to communicate" was protected not under Article 40.6.1(i), but as one of the unremunerated rights protected by Article 40.3.1 of the Constitution. As to privacy, it appears to be accepted that the right to privacy protected by the Constitution does extend to business affairs. Hanna J. so stated in the case of *Caldwell v. Mahon* [2007] 3 I.R. 542 but added that "such right can only exist at the outer reaches of and the furthest removed from the core personal right to privacy." This suggests that the right to privacy in business affairs is perhaps more

vulnerable than other constitutional rights and may have to yield, in appropriate circumstances, to other more robust and well established constitutional rights or to the exigencies of the common good.

90. In the case *of Digital Rights Ireland Ltd. v. The Minister for Communications, Marine and Natural Resources* [2001] IEHC 221, McKecknie J. held that this constitutional right to privacy in respect of business transactions extends to business transactions carried out by corporate bodies but stated that given the legal and factual nature of such artificial persons, the right will evidently be narrower than that applicable to natural persons.

91. In *Haughey v. Moriarty* [1999] 3 I.R.1 Hamilton J. commented:

> "For the purposes of this case, and not so holding, the court is prepared to accept that the constitutional right to privacy extends to the privacy and confidentiality of a citizen's banking records and transactions."

92. Counsel placed very limited reliance upon the Constitution in their various submissions to Court. In so far as they did, it seems to me that the relevant Constitutional principles are consistent with and not in any way in conflict with the convention principles or for that matter the principles of common law that are relevant to the issues and the proceedings.

Conclusions

93. The defendant acknowledges the right of the plaintiffs to confidentiality in the documents and information in the possession of the defendant. The existence of a right to confidentiality as between a bank and its customers has been recognised in law for almost a century. It is not just a private interest. As Lynch J. said in *National*

Irish Bank Ltd. v. Radió Telfis Éireann [1998] 2 I.R. 465, there is a public interest in the maintenance of such confidentiality for the benefit of society at large.

94. It is also agreed by the parties that that right to confidentiality is not absolute and that in given circumstances it may give way to issues of very significant public importance, and not just in cases where wrongdoing is involved.

95. It seems to me however that the authorities establish there must be some meaningful connection between the issue of public importance that has been identified and firstly, those whose rights may be breached and, secondly, the information and documentation under consideration. It could hardly be suggested that information of a confidential nature could be divulged absent any such connection.

96. In this case the issue of significant public interest that the defendant has raised arises under the broad heading of the corporate governance of IBRC. There is no doubt at all about the public interest in the affairs of IBRC. As MacEochaidh J. said in the case of *McKillen v. Times Newspapers Ltd. & Mark Tighe* [2013] IEHC 150 "the bank is run effectively at the direction of or by persons appointed by the Minister for Finance; and the whole of the operation is now, effectively, a public interest operation".

97. That of itself however does not entitle the public to know every detail of the affairs or operation of IBRC, and certainly not confidential information concerning its customers. The public interest is in knowing that it is properly governed and operated, and where there are any significant shortcomings in this regard, and in particular where such shortcomings may lead to significant losses, which have to be borne at the expense of the public purse, in my view the public is entitled to be informed of such matters.

98. The concerns raised by the defendant in this case relate to the relationship between the Department, the Minister for Finance and IBRC, to the relationship between the former CEO of IBRC and a major debtor (not Mr. O'Brien) and close relationships with large clients which the Minister considered inappropriate. One of those clients was Mr. O'Brien with whom the former CEO confirmed a strong but not inappropriate relationship. The concerns also included transactions which are alleged to have been poorly executed by IBRC, including the SiteServ transaction, with which Mr. O'Brien is connected. Except for the SiteServ transaction, none of these concerns involved Mr. O'Brien in any significant way. As to the SiteServ transaction, it has not been suggested that this is in any way related to the loan with which the information and documentation these proceedings is concerned and is not therefore of any relevance in the consideration of this application.

99. The defendant has emphasised that no allegation of wrongdoing of any kind is alleged against Mr. O'Brien. The concern that the defendant has raised in relation to Mr. O'Brien is that, upon the expiration of a deadline for re-payment of his loan facilities he applied to the then CEO for an extension of the time to repay the balance then outstanding. There is of course nothing at all unusual about such a request. However, it is the defendant's contention that this request may not have been properly processed within IBRC in so far as Mr. O'Brien alleges that he had a verbal agreement with the then CEO in relation to the duration of an extension of the period for repayment of the balance of his loan, in circumstances where any such agreement would require credit committee approval within IBRC. If such an agreement was reached without credit committee approval, it would indeed be indicative of a failure of corporate governance, having regard to the significant balance of the loan outstanding, and if it lead to a loss in the hands of IBRC, that might well justify a

determination that Mr. O'Brien could not rely on the confidentiality that would otherwise apply.

100. However, no evidence of a substantive nature was presented to the Court at all such that the Court could conclude that it was likely that there had been such a failure of corporate governance, i.e. that such a verbal agreement had been reached. At its height, the defendants' case is that Mr. O'Brien alleged the existence of such an agreement with the then CEO. The fact that it is Mr O'Brien himself who contends that he had an agreement with IBRC is, in my view, immaterial. As Mr Wallace averred in his affidavit, it is not unusual for borrowers, in their own interests, to assert that they have such an agreement. But that, by itself, falls far short of establishing the conclusion of an agreement. From the information made available to the Court, it does not appear that the existence of such an agreement was at any time, before or after the liquidation of IBRC, accepted by IBRC. When Mr. O'Brien asserted the existence of such an agreement, IBRC, as would be expected, took legal advice and considered its options in the light of that advice, as one would expect in such circumstances.

101. As to privacy, *prima facie*, Mr. O'Brien has an entitlement to privacy in this documentation both under Article 8 of the Convention, and pursuant to the constitutional guarantee of privacy as described by Hanna J. in the case of *Caldwell v. Mahon* and by McKecknie J. in the case *of Digital Rights Ireland Ltd. v. The Minister for Communication, Marine & Natural Resources & others*. This was also echoed in *McKillen v. Times Newspapers Ltd. and Tighe*: when MacEochaidh J. said "to put it bluntly, no one would like to see their banking details on the front page of any newspaper and therefore there is a public interest in protecting and upholding these confidences". This right, taken together with the plaintiff's rights to confidentiality in

their dealings with each other (which is an express exception provided for in Article 10(2) of the Convention) has to be balanced against the right of the defendant to freedom of expression under Article 10 of the Convention and Article 40.6 of the Constitution. In conducting this balancing exercise I believe that the Court must take account of the fact that very little, if any, connection has at this stage been established between the public interest in alleged failures of corporate governance at IBRC and Mr. O'Brien's personal dealings with IBRC. In the absence of such a connection, I believe that the Plaintiffs have established a convincing case that they will succeed at the full trial of the matter.

102. As to Article 10(2) of the Convention the proposed restriction is clearly one prescribed by law insofar as the common law right and duty of confidentiality in banking transactions has been recognised in this jurisdiction, and many other jurisdictions, for almost a century. In the *Fressoz* case, the European Court of Human Rights specifically acknowledged that the objective of protecting fiscal confidentiality is a legitimate objective for the purposes of Article 10(2).

103. It is also necessary to consider the proportionality of the proposed restriction. However, it is obvious that the orders sought by the plaintiffs are the only restrictions that will give effect to their rights to confidentiality in the documentation and information pending a full hearing.

104. Having concluded that the plaintiffs have established a convincing case that they will succeed at the full trial of the matter, I turn now to address the question of adequacy of damages if the plaintiffs do not succeed in obtaining an injunction.

105. IBRC has asserted only in a general way that the breach of its entitlement to confidentiality in its dealings with its customers will cause damage to IBRC in reputation and financial terms. Mr. O'Brien however, has been more specific and has

supported his claim that he will suffer incalculable and irreparable loss if the defendant is not restrained from publication, by procuring the affidavit of Mr. Trench. Mr. Trench states that the revelation of Mr. O'Brien's private and confidential banking information in the media is "likely to be sufficient to damage Mr. O'Brien's banking reputation as a customer" and "significantly undermine Mr. O'Brien's relationships with his bankers and impact on the terms of credit available to Mr. O'Brien". While Mr. Murphy on behalf of the defendant disputes this on the grounds earlier outlined in this judgment, I think that, at interlocutory stage, it is appropriate for the Court to give more weight to the views of Mr. Trench, a banking expert of many years standing in the industry than to the views of Mr. Murphy in this regard. If Mr. Trench is correct, it is apparent from his affidavit that the losses which the plaintiff might sustain in the future, if the defendant is not restrained, would quite literally be incalculable and as a consequence damages will not be an adequate remedy for Mr. O'Brien.

106. As to the defendant, Mr. O'Brien's counsel, Mr. Cush SC agreed that it is not possible to measure the losses that might be sustained by the defendant in the event that an injunction is granted. Accordingly I must therefore consider where the balance of convenience lies.

107. If no order is made, significant details of the private banking affairs of Mr. O'Brien will be placed in the public domain immediately. If Mr. Trench is correct, the mere fact of that occurring, regardless as to the nature of the content of that information, is likely to cause Mr. O'Brien incalculable loss. On the other hand, the story of IBRC is an ongoing one and it is highly likely that it will remain newsworthy for a considerable time to come, and certainly well after the determination of these proceedings. I fully accept the submission of counsel on behalf of the defendant that it

is not the function of the Court to intervene in the timing of delivery of news, this being in the ordinary course of events solely an editorial decision. However, when considering the balance of convenience between the parties I believe that in this case this is a factor which may properly be taken into account. It seems obvious to me that in this particular case the balance of convenience favours the plaintiffs and Mr. O'Brien in particular.

Distinguishing *McKillen v. Times Newspaper Ltd. & Mark Tighe*

108. In that decision, delivered by Mr. Justice MacEochaidh on 30th March, 2013, the defendant was restrained from reporting information of an opinion nature expressed by officials internally within IBRC and information relating to the commercial relationship between Mr. McKillen and Mr. O'Brien, the plaintiff in these proceedings. However, Mr. Justice MacEochaidh decided against the granting of an injunction restraining publication of the fact that a further loan was granted to Mr. McKillen.

113. It has been submitted to me by the defendant that any extension of a loan granted to Mr. O'Brien by IBRC is the equivalent of a new loan and accordingly the defendant should be free to publish this information. I do not agree with this submission. Firstly, it is not clear whether or not IBRC in fact agreed to any extension of the loan. Secondly, there is, in my opinion, a very definite distinction to be drawn between the granting of a new loan facility and the extension of an existing loan facility, although sometimes the latter is framed from a technical banking perspective, as a new loan. Thirdly, the fact that Mr. O'Brien applied for an extension of his loan facilities is in any event now in the public domain, owing to the intervention in the Dáil of Deputy Murphy. Accordingly, I believe that there is a

distinction to be drawn between the circumstances arising in the *McKillen* case and this case.

114. For all of these reasons, it is my opinion that the plaintiffs are entitled to orders restraining publication in the terms sought in Paragraph 1 of each of their notices of motion. I will hear submissions from counsel as to the precise terms of the order to be made.

115. Insofar as the plaintiffs seek orders requiring the defendant to deliver up documentation to the plaintiffs, such an order is not, in my view appropriate at this stage and is a matter for consideration at the full trial of the matter.

116. In view of my conclusions above, and also in view of the fact that it was not disputed by the defendant that legal professional privilege attaches to all documents or parts of documents comprising legal advice, I have not addressed the claim to legal professional privilege asserted by IBRC. However, those documents will necessarily be included in the terms of the orders I am now making for other reasons.