Neutral Citation Number: [2005] IEHC 307

THE HIGH COURT

[No. 2004 19832 P]

BETWEEN

HIS HONOUR JUDGE ALAN P. MAHON, HER HONOUR JUDGE MARY FAHERTY AND HIS HONOUR JUDGE GERALD B. KEYS (MEMBERS OF THE TRIBUNAL OF INQUIRY INTO CERTAIN PLANNING MATTERS AND PAYMENTS)

PLAINTIFF

AND

POST PUBLICATIONS LIMITED TRADING AS THE SUNDAY BUSINESS POST

DEFENDANT

Judgment of Mr. Justice Kelly delivered the 4th day of October, 2005

The Plaintiffs

1. The plaintiffs are the members of a tribunal of inquiry. It is called the Tribunal of Inquiry into Certain Planning Matters and Payments (the Tribunal). It was established pursuant to resolutions passed by both houses of the national parliament in October, 1997. The Tribunal was established pursuant to the provisions of the Tribunals of Inquiry (Evidence) Acts, 1921 and 1979 and a series of orders made by relevant Government Ministers from 1997 to 2004.

2. The Tribunal was set up to investigate as a matter of public importance alleged corruption in the planning process.

The Defendant

3. The defendant is a limited company which is a subsidiary of Thomas Crosbie (Holdings) Limited which is based in Cork and is the publisher of "The Examiner" newspaper. The defendant publishes a weekly newspaper called "The Sunday Business Post".

These Proceedings

4. These proceedings were commenced on 20th December, 2004. Three days beforehand an application was made *ex parte* to Finnegan P. for injunctive relief against the defendant.

5. On 17th December, 2004, that judge made an order in the following terms. He restrained the defendant –

> *"1. From publishing or using information or reproducing any document (or any part thereof) or the contents thereof in relation to which the defendant, its servants or agents are aware that the Tribunal has directed that such information or documentation should remain confidential until disclosed at public hearing of the Tribunal (sic) or as otherwise directed by the Tribunal until after the 17th January, 2005,*
>
> *2. Further or in the alternative (sic) an injunction restraining the defendant, its servants or agents from publishing or using information or reproducing any documents (or any part thereof) or the contents thereof in relation to which the defendant, its servants or agents are aware that the Tribunal has circulated on a confidential basis to any party or witness to the Tribunal,*
>
> > *(a) Before such information and/or the contents of such documents has been disclosed or read at a public hearing of the Tribunal, or*
> >
> > *(b) Until the Tribunal has given express permission for the publication, use or exploitation of such information and/or document until after the 17th day of December, 2005."(sic)*

6. A notice of motion returnable for 17th January, 2005, seeking similar relief on an interlocutory basis was brought and was adjourned from time to time so as to enable an exchange of affidavits to take place.

7. On completion of that exchange, the motion was transferred into my list for hearing. The parties agreed that the hearing of the motion would be treated as the trial of the action.

8. Oral evidence was not adduced. Indeed, there was no exchange of pleadings so that the only pleading in the case is the plenary summons (if pleading it be). The relief sought in the general endorsement of claim is the same as that sought and obtained from Finnegan P. on 17th December, 2004, except for the temporal limitation contained in that order. The reliefs are now sought perpetually.

The Evidence

9. The evidence in the case consists of two affidavits sworn on behalf of the plaintiffs and one affidavit sworn on behalf of the defendant. The plaintiffs' affidavits were sworn by Marcelle Gribbin, a solicitor who works for the Tribunal. The defendant's affidavit was sworn by Anthony Dinan who is a director of the defendant.

10. The evidence establishes the facts set out hereunder.

The Protocol

11. At a public hearing of the Tribunal which took place on 14th January, 1998, the then sole member (Flood J., the predecessor of the present members) outlined a protocol which the Tribunal would follow in respect of documents. He said:-

> *"I fully appreciate concerns which persons wishing to assist the Tribunal may have in relation to the issues of personal and commercial confidentiality. In order to protect these legitimate concerns I propose to adopt the following protocol in regard to documents:-*
>
> > *(i) All original documents will be returned to their owners after the Tribunal has concluded its work,*
> >
> > *(ii) All copies of documents with confidential, commercially sensitive or personal information will be destroyed after the conclusion of the inquiry,*
> >
> > *(iii) All documents will be stored in a secure location,*

(iv) Confidential information not relevant to the inquiry will not be disclosed to any outside party. The only parties who will have access to such documents will be the chairman and the legal team for the Tribunal,

(v) Documents, which contain both confidential, personal or commercially sensitive information not relevant to the inquiry and other information, which is relevant, will have the irrelevant information blanked out,

(vi) Counsel for the Tribunal will be willing at all times to discuss any concerns any person may have concerning confidential, personal or commercially sensitive information."

The Tribunal's Difficulties

12. Since it was established the Tribunal has experienced difficulties concerning what is described as unauthorised disclosure of confidential information. It is of the view that such unauthorised disclosures are deliberate. They have, it believes, been made by or on behalf of persons who have been or are likely to be called to give evidence to the Tribunal and are intended to undermine and delay the Tribunal in its work.

13. As a result of such a disclosure the Tribunal in December, 1998, wrote to the defendant expressing concerns as follows:–

> *"Following the continuing publication in the print media of confidential material provided to the Tribunal and circularised by the Tribunal on a strictly confidential basis, it is apparent that past publication of material has taken place, notwithstanding that the publishers were or ought to have been aware of the strictly confidential nature of the documentation which has been published without the authority of the Tribunal." It is fair to point out that the defendant was just one of a number of newspaper publishers written to in those terms.*

14. That letter recited that complaints had been received from individuals who alleged that their rights had been infringed by the unauthorised publication of documentation and information furnished to the Tribunal. Some pointed out that their desire to assist the Tribunal was limited by fear that confidential information disclosed by them would be published.

15. Over the many years that the Tribunal has been conducting its inquiries persons dealing with it have complained about leaks of confidential information to the media. Some of the complainants have sought action from the Tribunal to deal with these disclosures and publications. An example of such a letter was put in evidence before me in redacted form. It was received by the Tribunal in January, 1999 and called upon it to take action. Amongst the actions suggested was the making of a complaint to the garda, the seeking of undertakings by the Tribunal from relevant publications and, in default, the seeking of orders from this court. In the course of that letter it was stated:-

> *"… The leaks have caused, and continue to cause, enormous damage to our client. It was submitted to you that our clients cannot have any confidence in the Tribunal's confidential workings for as long as they read about them in the Sunday newspapers."*

16. Shortly before receipt of that letter the Tribunal sat in public to consider whether to make an order pursuant to the provisions of s. 4 of the Tribunals of Inquiry (Evidence) Act, 1979, against another newspaper, namely The Irish Times. During the course of the hearing a number of complaints that had been received from persons who at that time had confidential dealings with the Tribunal were outlined. Subsequent to that hearing on 18th December, 1998, the Tribunal delivered a ruling on the issue. It is not necessary to reproduce that ruling in this judgment save to record that the Tribunal made it clear that it would institute proceedings in this court to prevent any further unauthorised disclosure of what is described as confidential Tribunal information.

17. In December, 1998, a garda investigation was carried out concerning unauthorised disclosures of materials circulated in confidence by the Tribunal. It lasted for nearly four months and concerned six unauthorised disclosures. 98 people were interviewed including five journalists. 89 of those interviewed co-operated but four of the journalists interviewed declined to answer relevant questions or reveal their sources of information.

18. In January, 2001, it is alleged that the defendant and other newspapers published confidential Tribunal material. That resulted in a public statement being made by the Tribunal on 24th January, 2001. Again it is not necessary to set out that statement in extenso save to record that in its penultimate paragraph the Tribunal earnestly requested the media not to publish or disseminate information which was confidential to the Tribunal. The Tribunal made it clear that it would not hesitate to use any option available to it, including recourse to this court, to restrain what is described as "any improper disclosure of information confidential to the Tribunal".

19. On 26th January, 2001, the Tribunal wrote to the then solicitor for the defendant and a journalist, a Mr. Frank Connolly, concerning an article that had been published. The letter inter alia pointed out that the article appeared to have been based on documents compiled from a series of letters written to a financial institution by the Tribunal. The letters were written by the Tribunal as part of its preliminary investigations in private and were expressed to be so in the body of the letters. It was furthermore pointed out that each of the letters was headed "strictly private and confidential – to be opened by addressee only". The letter pointed out that the information contained in these letters remained confidential to the Tribunal whether contained in the letters themselves or in a document compiled from the letters.

20. The letter from the Tribunal went on to point out that the defendant must have been aware of the importance of the Tribunal's preliminary investigations and that the publication was a very serious infringement of the confidentiality of the Tribunal. The letter concluded by pointing out that the Tribunal expected that the defendant would maintain the confidentiality of the Tribunal.

Events in October, 2004

21. On 17th October, 2004, the defendant published two articles pertaining to the Tribunal. One was intituled *"Jim Kennedy's Pipe Dream"* and the other *"Fifty Councillors Named in New Planning Tribunal List"*.

22. It is the Tribunal's belief that confidential Tribunal documents formed the basis of these articles.

23. A number of documents in connection with what is described as the "Coolamber" module of the Tribunal's investigation had been circulated to a limited number of parties on 6th October, 2004. Further documents were circulated on 15th October. Public hearings in respect of that module did not commence until 7th December, 2004.

24. The Tribunal's letter accompanying those documents included a specific direction in the following terms:-

"The enclosed documents remain the property of the Tribunal and the information contained therein is confidential to the Tribunal and may not be disclosed to any person other than your legal advisor, who is likewise restrained from disclosing the contents thereof. You must retain the original enclosed documents in your possession."

25. The article, by a Mr. Barry O'Kelly, quoted directly from a number of these documents which had been circulated by the Tribunal.

26. On 21st October, the Tribunal wrote to Mr. O'Kelly requesting him to name the sources of the information utilised by him in his article and also any documents or other material which had been furnished to him.

27. Three days later a further article written by Mr. O'Kelly was published by the defendant. This time the heading of the article was *"Lenihan, Flynn in New Payments Revelations"*. This article referred to and included extracts from a statement furnished to the Tribunal by a Mr. Jude Campion. Accompanying the article was a photograph of an extract from that very statement. The photograph displayed the Tribunal's date stamp and the words "confidential" printed thereon.

28. The Jude Campion statement had been circulated by the Tribunal to a limited number of parties on 15th January, 2004 and on 21st October, 2004. The confidential nature of the documents was emphasised in the covering letters to all persons who were intended to receive it.

29. Mr. Campion gave evidence to the Tribunal over three days in October, 2004. On the first of those days, namely 14th October, 2004, the Tribunal directed that three specific persons named in his statement but who were not then on notice of the contents thereof should not be named in public or otherwise identified.

30. On 19th October, 2004, which was the third day upon which Mr. Campion gave evidence, the Tribunal ruled that its direction should be sought prior to naming any of the said three individuals in public at that time. Later that day a witness, Mr. George Redmond, sought a direction from the Tribunal as to the identity of these persons. The Tribunal directed that they should be referred to as A, B and C respectively.

31. Mr. O'Kelly was fully aware of the Tribunals directions when he wrote his article on 24th October, 2004. In the course of it he said:-

"The names of the T.Ds… were left unsaid at the request of the Tribunal."

32. Two days after publication of this article Mr. O'Kelly telephoned in response to the letter from the Tribunal's solicitor of 21st October, 2004. He said that he was not able to comply with the Tribunal's written request of 21st October, 2004, that he furnish the source or sources of his information and the materials furnished to him in respect of the article of 17th October, 2004.

33. The Tribunal received a number of complaints about the articles of 17th October and 24th October, 2004. These complaints were made on behalf of witnesses to whom the "Coolamber brief" had been circulated in confidence by the Tribunal.

34. In an effort to identify the person or persons who had leaked the confidential information and documents to Mr. O'Kelly, the Tribunal wrote to all parties to whom the brief (which included the statement of Mr. Campion) had been circulated. All of these parties denied that they had disclosed the information or documents to either Mr. O'Kelly or the Sunday Business Post or indeed to anyone.

35. On 28th October, 2004, the Tribunal's solicitor wrote to Mr. O'Kelly seeking the return to the Tribunal of the copy of the Jude Campion statement which was published in the article of 24th October, 2004.

36. This letter elicited a response from solicitors acting on behalf of Mr. O'Kelly and the defendant. They stated that neither the Sunday Business Post nor Mr. O'Kelly was in a position to divulge to the Tribunal the source or sources of either information or documents or indeed any other material that may have been furnished to Mr. O'Kelly in relation to the articles. The solicitors said that their client was concerned that the return of documents to the Tribunal could possibly identify the source of them. They wrote that their clients would undertake to destroy any such documents as identified in the Tribunal's letter as might be in their possession.

37. Immediately upon receipt of this letter the Tribunal contacted the solicitors directing that these documents should not be destroyed pending further direction of the Tribunal. This direction was conveyed to the defendants through their solicitor with speed. Not merely was there a message left on the relevant solicitor's voicemail but also a letter was sent by fax setting out the directions.

38. It is quite clear from evidence which was given to the Tribunal on 1st December, 2004, that the defendant's solicitor had conveyed the direction of the Tribunal to his clients by telephone on the date that he received it from the Tribunal, namely 5th November, 2004.

39. After some delay on the part of the defendant and Mr. O'Kelly it finally emerged from a letter of 12th November, 2004, written by their solicitors, that the documentation in question had been destroyed. This letter failed to make any mention of the faxed letter or the telephone calls made on 5th November, 2004.

40. As soon as it received this letter of 12th November, 2004, from the defendants' solicitors the Tribunal wrote expressing its astonishment that the documents had been destroyed. This was particularly so in light of the letter of 3rd November, 2004, from the defendants' solicitors, in which the defendants proposed to undertake to destroy the documentation, but not until such time as they had heard the views of the Tribunal. The letter concluded with the words "we await hearing".

41. In my view the Tribunal was correct in assuming that this letter gave a clear indication that the *status quo* would be maintained until the Tribunal communicated its views to the defendants' solicitors. Rather than honouring that, the defendants destroyed the documents. It is not to their credit that they should have done so.

The Summonses

42. On 16th November, 2004, the Tribunal issued three summonses. The first was addressed to Mr. O'Kelly. He was directed to attend a public sitting of the Tribunal and to produce and hand over a copy of the statement of Mr. Jude Campion and the documents obtained by the Sunday Business Post which were referred to in the article of 17th October, 2004, written by him.

43. The second summons was issued to Mr. Anthony William Dinan, the secretary of defendant. It directed him to attend a public sitting of the Tribunal and to produce and hand over the copy of the statement of Mr. Campion and the documents obtained by the newspaper and referred to in the articles of 17th October, 2004.

44. The third summons was issued to Mr. Daryl Broderick, the solicitor advising the defendant. It directed him to attend and give evidence in respect of the correspondence between the Tribunal and Mr. O'Kelly and his firm and to give evidence of his knowledge of the alleged destruction of a copy of the confidential statement and other documents furnished to and circulated by the Tribunal and which the Tribunal had directed should not be destroyed.

45. Subsequently the Tribunal was informed that the relevant solicitor dealing with the matter in the defendant's firm was Mr. Richard Martin. The Tribunal consented to him attending at the public hearing in place of Mr. Broderick.

The Hearing of 1st December, 2004
46. Messrs O'Kelly, Dinan and Martin attended a public sitting of the Tribunal on this date.

47. During the course of that hearing Mr. Martin informed the Tribunal that his firm, via Mr. Broderick, had received the Tribunal's faxed letter of 5th November, 2004 and had conveyed that direction to his clients by telephone on that date. He had no knowledge of the destruction of the documents other than what he received from the chief executive officer of the Sunday Business Post six days later. On foot of those instructions he wrote the letter of 12th November, 2004.

48. Mr. O'Kelly in the course of his sworn evidence was asked to produce and hand over the copy of the Jude Campion statement. He said "I wish no disrespect to the Tribunal but I can't do that". When asked why, he said it was because he had destroyed the document. He accepted that he had in his possession a number of confidential documents identified during the hearing as having come from the confidential Coolamber documentation circulated by the Tribunal in October, 2004. These documents formed the basis of his article of 17th October, 2004.

49. Mr. Dinan stated that he was no longer secretary of the company but was a director of the defendant and Thomas Crosbie (Holdings) Limited. He was asked if he would give an undertaking on behalf of the Sunday Business Post to the Tribunal in the terms requested in the Tribunal's letter of 10th November, 2004. In that letter the Tribunal had sought an undertaking that the defendant, Mr. O'Kelly and Thomas Crosbie (Holdings) Limited would henceforth not publish any documents or any contents thereof issued or circulated in confidence by the Tribunal unless such documents or its contents had been disclosed at a public sitting of the Tribunal.

50. Mr. Dinan refused to give such an undertaking saying that he would have to discuss the matter with his company.

51. The refusal of the defendant to give such an undertaking was confirmed by letter to the Tribunal dated 8th December, 2004.

The Ruling of 9th December, 2004
52. On this date the Tribunal ruled that it had acted correctly and lawfully in asking Mr. O'Kelly to reveal his source or sources and stated that it was necessary and appropriate and in the public interest *to inter alia* ensure that subsequent leaking of confidential Tribunal documents and information did not take place.

53. Following this ruling Mr. O'Kelly was recalled to give evidence and was ordered by the Tribunal to reveal his sources but he refused to do so.

54. The Tribunal pointed out to him that he was being directed to reveal his sources and asked him if he had been advised as to the possible consequences should he fail to do so. He replied that he had been so advised but he maintained his position.

55. On the same day Mr. Dinan gave evidence. Prior to the hearing he had been put on notice that he would be asked to give an undertaking on behalf of the defendant in the following terms:-

> *"That the Sunday Business Post will not publish information or reproduce documentation in relation to which it is aware that the Tribunal has directed that such information or documentation should remain confidential until disclosed at a public hearing or as otherwise directed."*

56. In the course of his sworn evidence on this occasion Mr. Dinan confirmed that he had read the Tribunal's letter but refused to give the undertaking as set out above or indeed any similar undertaking. He confirmed that this refusal meant that the newspaper would not abide by a direction of the Tribunal that particular information or documentation remain confidential.

The Tribunal's View
57. As a result of the attitude of non cooperation and indeed defiance of the Tribunal these proceedings were instituted. The Tribunal has expressed its view under oath in the following terms.

58. It believes that it is contrary to the public interest that documents and information circulated in confidence by it should be leaked to journalists and the media and published by them in circumstances where –

> (a) They know or ought to know that the information/document has been circulated in confidence by the Tribunal to a limited number of persons;
>
> (b) They know or ought to know that grave damage is likely to be done to the Tribunal in respect of its ongoing investigations in private and in public;
>
> (c) They know or ought to know that the Tribunal has been set up following the passage of resolutions by both houses of the national parliament and has been established to investigate matters of public importance, namely alleged payments to certain politicians and others;
>
> (d) They know or ought to know that relevant portions of the confidential documents will be opened in public within a short time in circumstances where parties affected thereby will have an opportunity of making submissions and/or giving evidence in relation to such documents or information whether by way of confirmation, denial, explanation or otherwise;
>
> (e) They know or ought to know that natural justice and the right to fair procedures before the Tribunal requires that information and/or documents circulated by the Tribunal should not be published or disclosed in public before they are disclosed or published at a hearing of the Tribunal.

59. The work of the Tribunal continues. As part of it, it will be circulating substantial numbers of confidential documents including statements of witnesses in advance of a public hearing of evidence in relation to new modules. Although the circulation of such

documents is as usual accompanied by a written warning to all concerned that the documents or their contents thereof should not be disclosed it is concerned that this will be dishonoured. It is concerned that, having regard to it's experience to date, some or all of the documents will be deliberately leaked by persons to whom they have been circulated. The Tribunal believes this is a deliberate attempt to undermine its work.

60. In the light of the refusal to give the undertaking sought and Mr. Dinan's evidence that the newspaper will not abide by a direction of the Tribunal that particular information or documents remain confidential, the Tribunal is apprehensive that further publications of the type in suit will occur. It is in these circumstances that the injunctions are sought.

The Defendants' Evidence

61. Mr. Dinan asserts that the setting up of the Tribunal arose because of various articles published in the Sunday Business Post newspaper concerning scandals in the planning sector.

62. He asserts, correctly, the stated procedure of the Tribunal to be to investigate modules in private followed by the issuing of a "brief" to interested parties and then the taking of evidence in public. His understanding is that the "brief" consists, *inter alia*, of copies of statements made by witnesses whom the tribunal intends to call together with copies of documents emanating from a wide variety of sources which the tribunal intends to rely upon in its open sessions. He says that there have been many occasions upon which newspapers and indeed other media organisations have published alleged confidential information whether consisting of an account of what witnesses were expected to say or an account of documents expected to be produced. He exhibits a selection of such articles and asserts that the defendants do not accept the matters in question are confidential or that any particular claim of confidentiality can be made by the tribunal in respect of them.

63. He points out that even in Ms. Gribbin's affidavit it is accepted that there have been many such publications by many newspapers since at least December, 1998. He also points out that in that month the Tribunal wrote to the editors of eight newspapers circulating in the jurisdiction seeking an undertaking in terms similar to that sought from the defendant. None of the editors written to by the Tribunal at that time furnished any such undertaking. He says that there is no difference in principle between the alleged breaches which occurred at and since that time and those of which complaint is now made. This is however the first application by the Tribunal to restrain the publication of such matters. He cannot understand why the Tribunal has waited for six years to institute proceedings of this nature and alleges that the Tribunal is guilty of enormous delay.

64. He says that the defendant does not accept that the Tribunal has the jurisdiction to embark upon the enquiry which it purported to begin. He asserts that it has no jurisdiction to ask questions of Mr. O'Kelly which would cause him to reveal his sources nor was it entitled to request of the newspaper that it give undertakings as to future conduct.

65. He does not accept that the information published was confidential. He does not accept that the tribunal was entitled to maintain any claim of confidentiality in respect of the information or documents. He says that statements were received from various parties by the Tribunal in private session. These were circulated to interested parties in advance of the commencement of the public sessions in a particular module. These were to form the basis of the evidence of the persons subsequently called to give evidence.

66. He then deals with the events of 5th November, 2004. He says that the decision to destroy the documents was taken by the journalist. He informed the chief executive of the newspaper that that step had been taken. The newspaper's solicitors were instructed to write to the Tribunal informing them that this had been done. He says that Mr. O'Kelly destroyed the documents in order to protect his sources. He believed that delivery up of the documents might reveal such sources.

67. Mr. Dinan then goes on to explain what he believes to be the general attitude taken by journalists on the question of revelation of their confidential sources.

68. He says that confidentiality of sources should be maintained in the public interest. He says that it frequently falls to newspapers to reveal matters of which the public ought to be aware but which journalists have obtained from sources which have provided the information in question on the basis of a guarantee that their identity will never be revealed. If that guarantee was broken in any given case then the likelihood of other material being provided in the future would become what he describes as "very small indeed". If the principle cannot be maintained, then he says real damage to the public interest is likely to follow.

69. He says that the information published by the newspaper in the articles of 17th and 24th October was in the public interest. The documents in question were not confidential documents. The information was circulated by the tribunal according to its practice. It contained serious allegations against various public figures which at that time had not been disclosed to the public. Circulation of the documents to those persons and to other interested parties ensured that the allegations had been made known to various parties. The actions of the journalist in writing the article merely ensured that those allegations were brought to a wider audience and that the public became aware, in some instances for the first time, of allegations of wrongdoing against various public figures. It was not known at that time whether or not those allegations would be made public or whether various witnesses would refer to the names of the persons or to their conduct. He says that the second article merely consisted of the publication of documents that appear from their description in the article not to have been confidential and not to have originated in the first instance from the tribunal. They had been circulated on the express basis that they would in due course be published in open session at the tribunal. He asserts that the defendants have not treated the directions of the tribunal in any improper manner but are anxious to establish that the decision of the tribunal to declare a document confidential cannot of itself be regarded as determinative of any decision as to whether or not to publish.

70. He does not accept that documents can be described as or regarded as confidential simply because they are so circulated by the tribunal. He says that that is the assumption which underlies this application. It is the tribunal's fear that documents would be published whilst they are in the process of being circulated to parties for the next module. He says that he is not aware of the contents of any of those documents but he does not accept that the tribunal can decree that these documents must all be regarded as confidential irrespective of their nature or content. He says that it is clear that various documents are circulated be the tribunal in advance of a public hearing which cannot in any circumstances be regarded as confidential notwithstanding that they are contained in a tribunal brief. Documents are, on a daily basis, referred to during the course of the tribunal and then exhibited on screens and may or may not be read into the evidence entirely. Many of these documents are matters concerning companies or title documents. These are documents which are widely available to the public through various public bodies, such as the Land Registry. Documents concerning the constitution of companies have been referred to during the course of the evidence which were contained in the circulated brief. These are also documents which cannot be deemed to be confidential or to ever have been so. Yet such documents were contained in the circulated brief and it is the contention of the Tribunal that these matters are confidential merely because the Tribunal so regards them.

71. He gives an example taken from para.38 of the grounding affidavit of Ms. Gribbin. There she sets out that the Tribunal is in the process of circulating a large number of documents including witness statements in advance of the public hearing relating to a new module. He says that it is set out that the circulation of such documents in confidence is accompanied by a written warning to all concerned that the documents and the contents thereof shall not be disclosed to any person. If this warning is in fact given with all the documents which are circulated, which appears to be the case, then he says that this of itself makes a nonsense of the basis for the alleged confidentiality.

72. He says that the defendants have difficulty with the order which is sought by the tribunal because it attempts to bind the newspaper in future in respect of unspecified documents in circumstances where the newspaper might or might not know that any particular ruling on confidentiality has been made by the tribunal. Indeed he says the application deals with information as well as documents and the newspaper would, in pursuance of its coverage of the tribunal, be severely hindered by being put into a position of having to refer any matter to the Tribunal in advance of publication. For example, he says, a comment made by any person which it is intended to publish on the subject of the Tribunal might well in fact contain information which the tribunal has declared to be or considers to be confidential. Yet that may never be known to the newspaper.

73. He says that the work of newspapers is essential in publicising the ongoing sittings of the Tribunal and in bringing to the attention of the public the revelations being made at it. Without commentary and coverage there would be no opportunity for the public to inform itself of the workings of the tribunal.

74. He says that the width of the order being sought is significant. The nature of the material which it might cover is unpredictable. He contends that it is self evident that it would be likely to prevent the publication of articles which would clearly be in the public interest to publish.

75. He alleges that the publication of previous articles did not prevent the Tribunal from carrying out its work. The Tribunal has a wide range of powers available to it to compel compliance. But he says there is no evidence to suggest that the work of the Tribunal has been impaired or hindered in any way. The Tribunal has now been operating for seven years but has not provided a single example which would suggest that the present application is necessary or that the workings of the Tribunal have been undermined in any concrete fashion.

The Tribunal's evidence in response

76. In reply, the Tribunal, through Ms. Gribbin, denies that it has been guilty of any delay in bringing this application. She says that it made all reasonable efforts to deal with the leaking of the confidential material in October, 2004, and took this action when the defendant failed to give the undertaking required of it.

77. She says that the Tribunal in the course of its private investigative work, which is mandated by statute, seeks statements from persons it has envisaged maybe be called as witnesses at the public hearings. She contends that these statements and the contents of the briefs circulated are confidential and remain so until they are opened at the public hearings.

78. At para.7 she accepts that documents such as copies of folios, company office searches and the like are not of themselves confidential documents. However, she contends when such documents are circulated with and in the context of other documents including, in many cases, statements made by witnesses who would be called to give evidence to the Tribunal, *all of the materials in the folder circulated by the Tribunal are designated by it to be confidential and are so.* (My emphasis) She says it is noteworthy that at no time has the defendant published details of a company office search without attempting to put the results of that search in context whether in relation to the names of the directors of the company, properties owned by it or profits earned.

79. She says that when seeking narrative statements the Tribunal directs that they are confidential documents. She exhibits a sample of the type of letter sent by the Tribunal when it requests a narrative statement. The letter which is normally addressed to a solicitor states *inter alia*:

> *"Secondly, they will provide the Tribunal with a document which will be circulated in advance of your client's evidence to those persons likely to be affected by his evidence so that they may have the opportunity, if they wish, to attend for the hearing of your client's evidence and to cross-examine him or furnish rebuttal evidence.*
>
> *The narrative statement should be set our chronologically and furnish as much detail as possible. Where available, it should refer to documents…*
>
> *At this time, the matters referred to above are the subject of the Tribunal's confidential preliminary investigation. In due course some or all of these matters will come into the public domain at a hearing of the Tribunal. Until that time, you and your client are obliged to ensure the confidentiality of your dealings with the Tribunal." It is contended that it is the Tribunal's concern that all those affected by a narrative statement should be on notice of it.*

80. Ms. Gribbin goes on to point out that weeks in advance of the public hearings for any given module, the Tribunal compiles a brief of relevant documents together with statements of intended evidence from proposed witnesses. This brief is circulated to interested parties in order to allow them to prepare for the public hearings. She says the briefs are circulated on a strictly confidential basis. At no stage has any party to whom the documents were circulated indicated to the Tribunal that it would not maintain the confidentiality of the brief prior to the public hearing.

81. She points out that where documents are leaked in advance the Tribunal is not in a position to protect the constitutional rights of parties affected. She also contends that the Tribunal is unable to effectively conduct its inquiries and fulfil its statutory mandate.

82. Ms. Gribbin believes that the defendant was not entitled to have access to the material in respect of which complaint is made or to publish it, prior to it being opened in the course of the public hearings.

83. The Tribunal contends that it had jurisdiction to embark upon the inquiry which resulted in the hearing of 1st December, 2004.

84. She points out that the Tribunal is mindful of the constitutional rights of the parties against whom allegations have been made and in particular their right to their good name. The effect of the policy of confidentiality, when properly operated, is that allegations made against certain parties are made within the proper forum of public hearings. In such a setting the full context and circumstances surrounding the allegations are made known at one and the same time as the allegations and the party against whom the allegation is made is given a proper opportunity to respond. The leaking of the contents of the brief prior to the public hearing seriously damages the rights of the parties against whom the allegations are made.

85. She reiterates the Tribunal's belief that the effect of the publication of confidential information is to undermine, obstruct and hinder its work. The Tribunal further alleges that the revelation of confidential matter by the defendant is motivated by a desire to increase circulation rather than any public interest as claimed by the defendants.

86. Turning to the articles of the 17th and 24th October, 2004, the Tribunal contends that the identification of the parties by the defendant was a decision taken in contempt of and in breach of the directions of the Tribunal. It was not in the public interest that the parties be identified at that time. Rather the determination by the Tribunal that identification should not be made was in the public interest because the individuals were not aware of the contents of the statements in question and were not able to exercise their constitutional rights in respect of the allegations.

87. Paragraph 21 of Ms. Gribbin's affidavit is of some importance and insofar as it is relevant I reproduce it verbatim. She says:

> *"The Tribunal is at all times mindful of the importance of the work carried out by the defendant and sections of the media in reporting the ongoing work of the Tribunal. I say that the plaintiffs accept the importance and value of such work. The plaintiffs accept that the defendant is entitled to report on all matters heard in public before the Tribunal and indeed accepts the value of such reporting. The Tribunal however does not accept that the defendant is entitled to report such matters arising out of confidential documentation and investigations prior to the matters being heard in public and those documents opened in public. Further the plaintiffs contend that the public interest does not justify such reporting of matters prior to the allegations being heard and tested in the course of the public hearing. The order sought by the Tribunal only extends to circumstances where the defendant is aware that the Tribunal has directed that documents are confidential. The Tribunal is not seeking to prohibit the publication of all information about the Tribunal nor in circumstances where the paper is unaware of a direction of the Tribunal." Ms. Gribbin goes on to say that the position adopted by the defendant in refusing to undertake not to publish material it knows to be the subject of a direction by the Tribunal is, in effect, a statement that it is entitled to defy or ignore such a direction at its own will. That approach seriously undermines the authority of the Tribunal and its credibility. There is a fear that other parties will adopt a similar stance with consequent further damage to the work of the Tribunal if an injunction of the type sought is not granted.*

Conclusions on the evidence

88. The absence of pleadings and a failure by the parties to identify any factual matters in issue in the case have rendered it necessary to set out the evidence in a more extensive form than I would have wished. A good deal of it is rather peripheral to the issues which arise on this application. I am only concerned with the injunctions sought in respect of future publications.

89. When one considers the evidence as a whole it appears to me that there is little factual matter in dispute between the parties.

90. I reach the following conclusions in respect of the evidence which is relevant to this case.

1. In carrying out its functions the Tribunal has obtained information from third parties relevant to its inquiries.

2. Such information may consist of documents or statements.

3. When seeking narrative statements the Tribunal expressly represents that they will remain confidential until they come into the public domain at a hearing of the Tribunal. Until that time they will remain confidential.

4. Insofar as documentary material is concerned it is subject to the protocol of the 14th January, 1998, which I have already set forth in this judgment.

5. On receipt of all of this information the Tribunal then collates and circulates all relevant documents (including the narrative statements of evidence of persons whom it proposes to call as witnesses at the public hearing at which such evidence will be tendered). This forms what has been referred to as a "brief".

6. The circulation of such a brief is made to a limited number of persons in advance of the public hearing. In general these persons consist of those whose good name or reputation might be adversely affected if evidence of the type outlined in the narrative statements were to be given in public. This procedure is embarked upon with a view to giving such persons notice of the allegations so as to enable them to take whatever steps they believe appropriate in order to vindicate their reputations.

7. At the time when the brief material is circulated to this limited number of persons all of the material contained in it is directed by the Tribunal to be confidential. That is so regardless of the source or nature of the material which is contained in the brief. Thus, the Tribunal asserts that even public documents when contained in such brief are to be treated as confidential. Such confidentiality is to be maintained until the matters in the brief are opened at a public session of the Tribunal.

8. In circulating such a brief the Tribunal has made it clear that it purports to restrain disclosure of the entire contents of the brief.

9. This elaborate procedure is embarked on so at to ensure that the Tribunal conducts itself with constitutional propriety particularly with regard to the rights of third parties.

10. The Tribunal accepts the importance of the work carried out by the defendants in reporting on its hearings and the matters before it. The Tribunal does not accept that the defendants may report on matters arising out of documents which it has determined to be confidential.

11. The Tribunal rulings concerning confidentiality have not been honoured in the past. Many of the failures of the past in this regard have been deliberate and the Tribunal believes done to impede and frustrate its efforts. Nonetheless it has continued to work for the last eight years and this is the first time that an action of this sort has been taken by it.

The Claim

91. I must deal with this case on the basis of the claim made.

92. It is quite clear that the Tribunal in asserting the confidentiality of everything which is contained in a brief makes no distinction between information obtained by it from a third party in circumstances where an assurance of confidentiality was given to such a party and material which is not covered by such an assurance.

93. The Tribunal contends that it has the entitlement to create an obligation of confidentiality in respect of material contained in the brief circulated by it, regardless of the source or nature of the documents or information which it contains. It is that assertion of confidentiality which it seeks to enforce in these proceedings. There can be little doubt of this when one considers the affidavit evidence and in particular paragraph 7 of the replying affidavit of Ms. Gribbin and the form of the orders which I am asked to make.

The orders sought
94. Earlier in this judgment I reproduced in full the order granted by Finnegan P. which is now sought on a perpetual basis.

95. The first order seeks to restrain the publication or use of information or the reproduction of any document of which the defendants are aware that "the Tribunal has directed that such information or documentation should remain confidential until disclosed at a public hearing of the Tribunal".

96. The second order seeks an injunction restraining the defendants from publishing or using information or reproducing any documents or the contents thereof if the defendants are aware that the Tribunal has circulated this on a confidential basis to any party or witness to the Tribunal. This injunction seeks to limit the use or dissemination of this information before the documents have been disclosed or read at a public hearing of the Tribunal in the absence of a specific permission being given prior to such event.

The Defendants' Propositions
97. The defendants contend that the Tribunal is not entitled to the injunctions which it seeks for a number of reasons. They can be summarised as follows:-

> 1. The Tribunal's claim involves an assertion that it is entitled to direct that information or documents should be or remain confidential and to circulate such material on a confidential basis even though some at least of that material is not itself confidential. It has no power to do so.
>
> 2. The information and documents do not have the necessary quality of confidence about them to warrant the grant of the injunction sought.
>
> 3. The Tribunal does not have a sufficient interest to enable it to obtain the order sought.
>
> 4. The reliefs sought are unenforceable because the documentation or information is not specific, detailed or readily identifiable.
>
> 5. The injunctions sought are an unnecessary fetter on the constitutional rights enjoyed by the defendants under Article 40.6.1 of the Constitution.
>
> 6. The orders sought offend against the rights recognised in Article 10 of the European Convention on Human Rights.

Background Against which Application must be Viewed
98. The injunctions seek to restrain an organ of the press from publishing material. The right to free expression is one which is specifically recognised under Article 40.6.1.i of the Constitution. There it is stated that "the State guarantees liberty for the exercise, subject to public order and morality, of the right of the citizens to express freely their convictions and opinions".

99. Later in the Article specific mention is made of the liberty of expression of the press. The Article protects the dissemination of information as well as the expression of convictions and opinions. In this regard the judgment of Barrington J. in *The Irish Times v. Ireland* [1998] 1 I.R. 359 is on point where he said:-

> *"These rights must include the right to report the news as well as the right to comment on it. A constitutional right which protected the right to comment on the news but not the right to report it would appear to me to be a nonsense."*

100. The rights guaranteed under the Article, whether conferred on a citizen or an organ of the media, are not unlimited.

101. The right of freedom of expression is to be found not merely in the Constitution but also in Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention). That provides:-

> *"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 authority and regardless of frontiers."*

102. No more than the right of freedom of expression guaranteed under the Constitution, that guaranteed under Article 10 of the Convention is likewise subject to limitations. They are to be found in Article 10(2) which provides:-

> *"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 of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."*

103. The importance of freedom of expression has been recognised in many cases even in jurisdictions which do not have a constitutional protection such as is to be found in Article 46.1.1.i.

104. One such jurisdiction is, of course, England where, even before the Convention became part of the domestic law of that jurisdiction, Hoffmann L.J. (as he then was) had this to say on the topic in *R. v. Central Independent Television PLC* [1994] Fam. 192:-

> *"There are in the law reports many impressive and emphatic statements about the importance of the freedom of speech and the press. But they are often followed by a paragraph which begins with the word 'nevertheless'. The judge then goes on to explain that there are other interests which have to be balanced against press freedom. And deciding upon the importance of press freedom in the particular case, he is likely to distinguish between what he thinks deserves publication in the public interest and things in which the public are merely interested. He may even advert to the commercial motives of the newspaper or television company compared with the damage to the public or individual interest which would be caused by publication. The motives which impel judges to assume a power to balance freedom of speech against other interests are almost always understandable and humane on the facts of the particular case before them. Newspapers are sometimes irresponsible and their motives in a market economy cannot be expected to be unalloyed by considerations of commercial advantage. Publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest. But a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which 'right thinking people' regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute. Furthermore, in order to enable us to meet our international obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms, it is necessary that any exception should satisfy the tests laid down in Article 10.2. They must be necessary in a democratic society and fall within certain permissible categories, namely: '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 of others, for preventing the disclosure of information received in confidence, for maintaining the authority or impartiality of the judiciary'. It cannot be too strongly emphasised that outside the established exceptions, or any new ones which Parliament may enact in accordance with its obligations under the Convention, there is no question of balancing freedom of speech against other interests. It is a trump card which always wins."*

105. If this be the general approach to freedom of expression in a jurisdiction devoid of a written constitution containing an express guarantee of such a right how much more appropriate is it in this state? Whilst one might take issue with some of his language this general approach of Hoffman L.J. has already met with the approval of O'Hanlon J. in *M. v. Drury & Ors*, [1994] 2 I.R. 8.

106. More recently in *R. v. Secretary of State for the Home Department, ex parte*, *Simms* [2002] 2 AC 115, Lord Steyn said this on the same topic:-

> *"Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self fulfilment of individuals in society. Secondly, in the famous words of Holmes J. (echoing John Stuart Mill) 'the best test of truth is the power of thought to get itself accepted in the competition of the market': Abrams v. United States [1919] 250 US 616, 630 per Holmes J. (dissenting). Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country…"*

107. The jurisprudence which has developed under Article 10 of the Convention is also instructive and relevant.

108. In *Barthold v. Germany the European Court of Human Rights* described the role of the press as "purveyor of information and public watchdog".

109. In *McCarten Turkington Breen (a firm) v. Times Newspapers Limited* [2001] 2 AC 277, Lord Bingham of Cornhill said:-

> *"In a modern, developed society it is only a small minority of citizens who can participate directly in the discussions and decisions which shape the public life of that society. The majority can participate only indirectly, by exercising their rights as citizens to vote, express their opinions, make representations to the authorities, form pressure groups and so on. But the majority cannot participate in the public life of their society in these ways if they are not alerted to and informed about matters which call or may call for consideration and action. It is very largely through the media, including of course the press, that they will be so alerted and informed. The proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring. For this reason the courts, here and elsewhere, have recognised the cardinal importance of press freedom and the need for any restriction on that freedom to be proportionate and no more than is necessary to promote the legitimate object of the restriction."*

110. Lord Bingham's observations apply with equal force to the position which obtains in this jurisdiction.

111. This court recognises the cardinal importance of press freedom. Any restriction on it must be proportionate and no more than is necessary to promote the legitimate object of the restriction. The position can be summarised succinctly by a quotation from the judgment of O'Higgins C.J. in *Cullen v. Toibín* [1984] I.L.R.M. 577 where he said:-

> *"The freedom of the press and of communication which is guaranteed by the Constitution… cannot be lightly curtailed."*

112. It is against this background of a constitutionally guaranteed entitlement to press freedom coupled with a similar right under Article 10 of the Convention that this application for injunctive relief must be viewed.

The Tribunal and Confidentiality

113. In the case of *O'Callaghan v. The Tribunal, High Court* [2004] 1 I.E.H.C. 271 and Supreme Court, (unreported, 9th March, 2005) the Tribunal asserted an entitlement, on the basis of confidentiality, not to disclose material to Mr. O'Callaghan. He contended that the failure to furnish the information to him was a breach of his entitlements to fair procedures. The High Court granted *certiorari* to quash the Tribunal's refusal. It also granted a declaration that the refusal to permit Mr. O'Callaghan, through his legal representative, access to the documents which were relevant to the module of the inquiry with which he was involved amounted to a failure by the Tribunal to observe and protect the rights of the applicant to fair procedures and natural and constitutional justice.

114. The decision of the High Court was affirmed by the Supreme Court where the majority judgment was delivered by Geoghegan J. There was a concurring minority judgment delivered by Hardiman J.

115. In the course of the judgment of Geoghegan J. he made it clear that the Tribunal relied on an understanding of confidentiality in order to attempt to support the stance which it took.

116. In the course of his judgment Hardiman J. accepted (at pg.74) that:-

> *"The Tribunal owes an obligation to those who gave information in its preliminary investigative stage, as well as to others, to keep such information confidential unless and until it decides to hold an enquiry in public into the relevant subject matter, and even after that until any person impugned in such material has a proper opportunity for confrontation, challenge and rebuttal."*

117. However, he then goes on to observe in the following pages as follows:-

> *"In my view, the Tribunal cannot by the unilateral adoption of a 'policy' on its own part confer the quality of confidentiality, absolute unless the Tribunal itself waives it, on any material. To permit the Tribunal to do this would, in my view, be to allow it in effect to legislate for the deprivation of a party before it of rights to which he is entitled."*

118. On the following page of the judgment under the heading 'Confidential?' that judge says as follows:-

> *"For the reasons set out above, I do not believe that statements of Mr. Gilmartin to the Tribunal in its private investigative stage, or indeed other statements by him, or statements by other parties recording his complaints, partake of confidentiality except in the limited sense that they should not be revealed until parties impugned have an opportunity to deny and confront. Even this limitation is in the interest of constitutional justice, and not of the Tribunal of the witness. I do not believe that the Tribunal is entitled unilaterally to change this position by the adopting of a 'policy' of its own, especially one which it does not appear to have communicated to anyone until a challenge arose."*

119. In the present case I am of opinion that the claim to confidentiality goes even further than that which was unsuccessfully asserted by the Tribunal in *O'Callaghan's* case. Having received statements on a confidential basis the Tribunal then circulates those statements and other material to the relevant parties. All of those documents whether obtained confidentially or not (and some of which are public documents) are sought to be rendered confidential by a policy decision of the Tribunal. Regardless of nature or source every document in a brief is said to be confidential and this court is asked to intervene so as to enjoin publication of all and any of that material by the defendant. I can find no authority statutory or otherwise, express or implied which enables the Tribunal to create such far reaching confidentiality, nor in my view should this court enforce it.

120. Had the Tribunal been less ambitious and sought merely to ensure that documents which it obtained in confidence would have their confidentiality preserved by injunctive relief, there might be something to be said for the courts intervention; but that is not what is sought. Both in the affidavit evidence, the form of order sought and the submissions made, it is quite clear that the Tribunal seeks to go much further and to render confidential everything contained in a brief regardless of nature or source.

121. Even if one considers the position apart from *O'Callaghan's case* could there be any basis to support such a wide claim of confidentiality?

Confidentiality

122. In the course of his judgment in the case of *Coco v. A.N. Clarke (Engineers) Limited* [1969] R.P.C. 41, Megarry J. (as he then was) set forth a very short history of the equitable jurisdiction of the court in cases of breach of confidence. He asserted that confidence is the cousin of trust. He went back to the Statute of Uses 1535 and a couplet attributed to St. Sir Thomas More L.C. where he said that:-

> *"Three things are to be held in conscience; fraud, accident and things of confidence."*

123. He then moved to the middle of the 19th century and the case of *Prince Albert v. Strange* [1849] 1 Mac+G 25 which reasserted the doctrine.

124. The case that Megarry J. was considering was one where there was no question of any breach of contract so what he had to consider was the pure equitable doctrine of confidence unaffected by contract. He went on to say:-

> *"In my judgment three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene M.R. in the Saltman case on pg.215, must 'have the necessary quality of confidence about it'. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it."*

125. Dealing with the first of these conditions (which is the relevant one here) Megarry J. said as follows:-

> *"First, the information must be of a confidential nature. As Lord Greene said in the Saltman case at pg.215, 'something which is public property and public knowledge', cannot per se provide any foundation for proceedings for breach of confidence. However confidential the circumstances of communication, there can be no breach of confidence in revealing to others something which is already common knowledge."*

126. More recently and in a context more akin to this case than was Coco's case (which concerned confidential information in a commercial context) Lord Goff in *Attorney Gerneral v. Guardian Newspaper* [1990] 1 A.C. 109 said this in attempting to define confidentiality:-

> *"I start with a broad principle (which I do not intend in any way to be definitive) that a duty of confidence arises where confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others. I have used the word 'notice' advisedly, in order to avoid the (here unnecessary) question of the extent of which actual knowledge is necessary; though I of course understand knowledge to include circumstances where the confidant has deliberately closed his eyes to the obvious."*

127. Coming closer to home, Costello J. (as he was then) in *House of Spring Gardens v. Point Blank* [1994] I.R. 611 had this to say on the topic of confidentiality:-

> *"First, I think that the information must be information the release of which the owner believes will be injurious to him or of advantage to his rivals or others. Second, I think the owner must believe that the information is confidential or*

secret, i.e. that it is not already in the public domain. It may be that some or all of his rivals already have the information: but as long as the owner believes it to be confidential I think he is entitled to try and protect it. Third, I think that the owner's belief under the two previous headings must be reasonable. Fourth, I think that the information must be judged in light of the usage and practices of the particular industry or trade concerned. It may be that information which does not satisfy all these requirements may be entitled to protection as confidential information and trade secrets: but I think that any information which does satisfy them must be of a type which is entitled to protection."

128. The decision of Costello J. was affirmed by the Supreme Court.

129. Thus, it appears that, whether one is speaking about confidentiality in the context of trade or commerce or of the type dealt with in *Attorney General v. Times Newspapers* or indeed the present case, confidentiality can only attach to information which is truly confidential. It must have the necessary quality of confidence about it. Thus documents or information in the public domain cannot be regarded as confidential.

130. The reliefs which I am asked to grant seek to cover all of the material in a brief which the Tribunal has directed should remain confidential. Some of that material was obtained confidentially, some not. Some are public documents, some not. The mere fact that the Tribunal has directed that information or documents should remain confidential does not, in my view, make such documents confidential.

131. The only material which could be capable of protection is that which has the necessary quality of confidence about it. Material which is public property and public knowledge cannot have that quality. No order of the Tribunal can make it so. Some of the material in the brief might well be capable of protection but the injunctive reliefs sought make no such distinction or give any clue in that regard.

The Constitution and The European Convention on Human Rights

132. I have already touched upon freedom of the press under both the Constitution and the Convention. The right of freedom of expression given to the press under both documents is not unfettered. If the court were to restrict that freedom by means of an injunction it must do so within strictly limited parameters. Quite a sophisticated jurisprudence has developed on this topic in the context of the Convention.

133. In *R. v. Shayler* [2003] 1 A.C. 247, Lord Hope of Craighead at 280 considered Article 10(2) of the Convention which I have already reproduced. He said:-

> *"The wording of Article 10(2) as applied to this case indicates that any such restriction, if it is to be compatible with the Convention right, must satisfy two basic requirements. First, the restriction must be, 'prescribed by law'. So it must satisfy the principle of legality. The second is that it must be such as is 'necessary' in the interests of national security. This raises the question of proportionality. The jurisprudence of the European Court of Human Rights explains how these principles are to be understood and applied in the context of the facts of this case. As any restriction with the right to freedom of expression must be subjected to very close scrutiny, it is important to identify the requirements of that jurisprudence before undertaking that exercise.*
>
> *The principle of legality requires the court to address itself to three distinct questions. The first is whether there is a legal basis in domestic law for the restriction. The second is whether the law or rule in question is sufficiently accessible to the individual who is affected by the restriction, and sufficiently precise to enable him to understand its scope and foresee the consequences of his actions so that he can regulate his conduct without breaking the law. The third is whether, assuming that these two requirements are satisfied, it is nevertheless open to the criticism on the Convention ground that it was applied in a way that is arbitrary because, for example, it is being resorted to in bad faith or in a way that is not proportionate. I derive these principles, which have been mentioned many times in subsequent cases, from The Sunday Times v. The United Kingdom, 2 E.H.R.R. 245, para.49 and also from Winterwerp v. The Netherlands [1979] 2 E.H.R.R. 387, 402 – 403, para.39 and Engel v. The Netherlands (1) 1 E.H.R.R. 647, 669, paras.58 to 59, which were concerned with the principle of legality in the context of Article 5(1); see also A. v. The Scottish Ministers [2001] SLT 1331, 1336 – 1337."*

134. In my view the orders sought in these proceedings fail at least some and perhaps all of the tests mentioned by Lord Hope and distilled by him from a substantial corpus of European jurisprudence.

135. In particular it does not appear to me that the orders here could be regarded as proportionate. If they were to be so, relevant and sufficient reasons would have to given to justify the restriction and it would have to correspond to a pressing social need. It would also have to be proportionate to the legitimate aim pursued. I cannot see that any of these elements are made out.

136. Why should the court lend its hand to a curtailment of press freedom in respect of material which is alleged to be confidential by reason of a decision of the Tribunal, where it is clear that that decision seeks to impose confidentiality on material some of which is not and could not be regarded as confidential in nature? The fact that the material in the brief may contain information obtained in confidence cannot be justification for the wide form of restraint which is sought. It is entirely disproportionate to the aim being pursued and in excess of any legitimate need.

137. Indeed the matter is returned to again by Lord Hope at pg.281, para. 61 where in considering the question of proportionality he followed a three stage test which had been identified in earlier cases which are cited by him at para.61. He said:-

> *"The first is whether the objective which is sought to be achieved – the pressing social need – is sufficiently important to justify limiting the fundamental right. The second is whether the means chosen to limit that right are rational, fair and not arbitrary. The third is whether the means used impair the right as minimally as is reasonably possible. As these propositions indicate, it is not enough to assert that the decision that was taken was a reasonable one. A close and penetrating examination of the factual justification for the restriction is needed if the fundamental rights enshrined in the Convention are to remain practical and effective for everyone who wishes to exercise them." I am of the view that the evidence presented to the court by the Tribunal is very general and does not permit of the close and penetrating examination as envisaged.*

138. But perhaps the most important element of all on this aspect of the case is that, in my view, it cannot be said that the order sought impairs the defendant's rights as little as possible.

139. On the contrary, the order sought would prevent the defendants from publishing material that is already in the public domain, that was not given to the Tribunal in confidence, that did not come into existence for the Tribunal's purposes and whose owners may have no objection to the defendant publishing it. An injunction of the type sought goes much further than one which could ever be required to address the Tribunal's alleged difficulties. Such an order would fetter and impede the defendant to a much greater extent than could ever be regarded as necessary.

140. It is true that restrictions may be legitimately imposed on press freedom under Article 10(2) of the Convention so as to protect the reputation of persons or to prevent disclosure of information received in confidence. The injunctions sought here go much further than what could be regarded as proportionate to addressing either of these elements.

141. In these circumstances I am satisfied that the restraint sought to be applied could not be justified by reference to Article 10(2) of the Convention.

The Closing Submission
142. In the course of closing the case counsel on behalf of the Tribunal submitted that if the court was of the view that the restriction sought to be imposed by the injunction was too wide the court could frame its own form of order so as to address the mischief.

143. First, I do not think it is any part of the court's function to draft the order. That is for the Tribunal. But even if I was prepared to do so at least two conditions would have to be met.

144. I would have to have sufficient information to enable me to draft an order that is "sufficiently precise to enable (the defendants) to understand its scope and foresee the consequences of (their) actions so that (they) can regulate (their) conduct without breaking the law" (per Lord Hope). The order would also have to be drafted so as to protect only that deserving of protection (truly confidential material) and impede the defendants in their entitlements to the minimal extent reasonably possible. It would be difficult to draft such an order.

145. Insofar as the first of these problems is concerned I am reminded of the observations of Lord Nichols in *Attorney General v. Punch Limited* [2003] 1 A.C. 1046 where he said:-

> *"Here arises the practical difficulty of devising a suitable form of words. An interlocutory injunction, like any other injunction, must be expressed in terms which are clear and certain. The injunction must define precisely what acts are prohibited. The court must ensure that the language of its order makes plain what is permitted and what is prohibited. This is a well established, soundly based principle. A person should not be put at risk of being in contempt of court by any ambiguous prohibition, or a prohibition the scope of which is obviously open to dispute. An order expressed to restrain publication of 'confidential information' or 'information whose disclosure risks damaging national security' would be undesirable for this reason."*

146. As for the second condition, I do not have information sufficient to enable me to fulfil it.

Conclusions
147. In my view the injunctions sought here go much too far. They seek to enforce a species of confidentiality created unilaterally by the Tribunal. The confidentiality which it seeks to establish is all encompassing and captures every document and piece of information in the brief which the Tribunal circulates. It takes no account of the nature or source of the information in that brief. It manifestly seeks to extend to information already in the public domain. In my view the court could not contemplate granting an injunction of the type sought.

148. The right of the press to report is not an unfettered one. But if it is to be curtailed by court order there must be a sound legal basis for so doing. Having regard, in particular to the jurisprudence which has developed in relation to Article 10(2) of the Convention, I can find no sound legal basis for the wide ranging form of order which is sought in these proceedings.

149. I am not without sympathy for the difficulty which confronts the Tribunal. It must conduct its proceedings mindful of the rights of persons who gave it information on a confidential basis and the constitutional entitlements to good name of those who may be impugned in such material. But in attempting to do so it has, in my view, sought to interfere impermissibly with the rights of the defendants.

150. It has taken a blunderbuss as its weapon of choice in protection of the undoubted rights of persons whose reputations may be damaged or who furnished truly confidential information to it. What was required was a weapon of precision which would protect that deserving of protection whilst inflicting minimal collateral restrictions on the defendants' rights.

151. Had the Tribunal been less ambitious and sought merely to restrain in futuro material which is obtained on a confidential basis there might be something to be said for the grant of an injunction of that type. Such an application is not itself, however, without its problems. Apart from the difficulty of drafting an appropriate order there might well be an argument made that it is only the person who is owed the duty of confidence who can seek to protect it. That however is not a matter which I have to address since the Tribunal, in these proceedings, is not confining itself to the protection of such confidentiality. Rather it has sought to trespass beyond the permissible. It seeks to enjoin the defendants on a basis which is not justified in law and this court cannot come to its aid.

152. The reliefs sought are refused.