THE HIGH COURT

[Record No. 2014/385 MCA]

IN THE MATTER OF A CONTEMPT OF COURT AND IN THE MATTER OF AN APPLICATION PURSUANT TO ORDER 44 OF THE RULES OF THE SUPERIOR COURTS 1986

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

INDEPENDENT NEWS AND MEDIA PLC, CLAIRE GRADY AND STEPHEN RAE

RESPONDENTS

JUDGMENT of Ms. Justice Iseult O'Malley delivered the 24th day of April 2015.

Note: Only the "Summary and conclusion" of this judgment may be published until further order.

Introduction

1. This case concerns an allegation of contempt of court made by the Director of Public Prosecutions against the respondents arising out of the publication of certain material. The facts of the case are not in dispute and there was therefore no requirement to have any factual matter decided by a jury. The issue for the court is whether or not the publication amounted to a contempt.

2. The first named respondent is the parent company of the publisher of *The Irish Independent*. The second named respondent was the editor of that newspaper at the time when these proceedings were issued. She has since left that position and the applicant no longer seeks any order as against her. The third named respondent is the editor in chief. By consent of the parties, Internet Interactions Limited has been joined as a respondent. This entity is a subsidiary of the first named respondent and owns and operates a website on its behalf.

3. The proceedings are in relation to material published in *The Irish Independent* on the 17th July, 2014, and posted on its website that day and the next. The printed material consisted of extracts from transcripts of taped phone conversations between former officials of Anglo Irish Bank – the "Anglo tapes" - together with articles commenting on the tapes. The online content included a number of videos relating to those conversations, featuring the audio versions. The videos were taken down at some stage after the applicant's initiation of proceedings.

4. Two former officials of the bank, who are both named in the publication, are currently awaiting trial on criminal charges alongside two former officials from another bank.

5. The applicant alleges that the publication of the articles and videos amounts to a breach of the *sub judice* principle and contempt of court on the part of the respondents. She seeks an order pursuant to O. 44 of the Rules of the Superior Courts, directing the attachment and committal and/or sequestration of the assets of the respondents, as the case may be; and an order in the nature of an injunction restraining the respondent from publishing further material calculated to interfere with the criminal trial processes in being in respect of the events at Anglo Irish Bank and in particular restraining the respondent from publishing further extracts from the "Anglo tapes".

Background facts

6. For present purposes it is necessary only to note, without any detailed consideration, that the collapse of Anglo Irish bank and its takeover by the State have led to various extensive inquiries including criminal investigations. A number of individuals who were employed by the bank have been charged with various criminal offences.

7. The applicant says that before the matters in issue in this case arose, she had occasion to write to the first named respondent on the 21st December, 2012, the 26th June, 2013, and the 27th June, 2013, in relation to coverage of matters relating to former Anglo Irish Bank executives who were facing trial.

8. The first letter noted that a complaint had been received from the solicitors acting for a person accused with an offence under the Companies Act, 1963 about an article which, it was complained, constituted a contempt of court. It was stated that the Director was finalising her consideration of the matter and would be in further contact. It appears that there was in fact no follow-up to this letter.

9. The letter of the 26th June, 2013, concerned publication of material related to the first series of Anglo tapes. It referred to a trial fixed to commence the following January. It expressed concern that articles that had been appearing in *The Irish Independent* over the previous few days, combined with those which might be planned over the coming days, would lead to a situation where there might be a serious question as to whether a jury would be able to carry out its function in a dispassionate way.

> *"While the Director accepts that the former officials named are not those whose trial is pending and the issues being discussed do not relate directly to the charges pending before the courts, there may nonetheless be a danger that an accumulation of articles might have the effect of tainting all former officials particularly senior officials of Anglo Irish Bank, including those the subject of charge.*
>
> *In the circumstances the Director seeks your assurance that you will use your best endeavours to ensure that no further articles will appear in your newspaper which might prejudice the position of the accused persons whose trial is pending. Unless you provide such an undertaking the Director will take such steps as she deems proper to protect the integrity of the trial process."*

10. The third letter, written in response to a reply from the respondent on the 26th June, indicated that the applicant was considering seeking an appropriate order from the Circuit Criminal Court to protect the integrity of the trial process. However, it appears that no such action was taken in that case.

11. Mr. John Bowe, Mr. Denis Casey and Mr. Peter Fitzpatrick and Mr. William McAteer are co-accused in pending criminal proceedings. Mr. Bowe was the Head of Capital Markets in Anglo Irish. Mr. McAteer also held a relatively senior position there. The other two

gentlemen worked for a different financial institution.

10. According to the affidavits, Mr. Bowe was charged on the 18th December, 2014, with conspiracy to defraud contrary to common law and false accounting contrary to s.10 of the Criminal Justice Theft and Fraud Act, 2001. Mr. Casey and Mr. Fitzpatrick were charged on the same date with conspiracy to defraud. Mr. McAteer was charged on the 17th June, 2014, with false accounting and conspiracy. All of the charges relate to a particular transaction, carried out on the 30th September, 2008, between Anglo Irish and another bank ("the transaction"). It will be alleged by the prosecution that the effect of the transaction was to create a false impression of the scale of deposits held by Anglo Irish at that time. However, it should be noted that the conspiracy to defraud, as particularised on the indictment, is alleged in relation to "*divers dates between the 1 March 2008 and 30 September 2008 both dates inclusive".*

11. At least some of the dates of charge set out here must be wrong. In particular the date in relation to Mr. Bowe should perhaps be read as referring to 2013. It does however seem to be clear that the accused were returned from the District Court to the Circuit Criminal Court on these charges on the 17th June, 2014.

12. The matter was first listed in Dublin Circuit Court on the 11th July, 2014, and a trial date of the 11th January, 2016, has been set.

13. On the 17th July, 2014, the respondents published a five-page set of articles in *the Irish Independent*, starting on the front page with the headline "*Anglo: the new tapes revealed.*" The three sub-headings read "*Recordings show how Drumm tried to gloss over perilous state of bank*", "*Bankers laughed and joked as financial crisis engulfed the economy"* and "*Drumm said he would give 'Ladybird version' of events to the board".*

14. The reference to "Drumm" is to David Drumm, the former Chief Executive of Anglo Irish.

15. The article read in relevant part as follows:

> *"New tapes have emerged which throw the months before the calamitous bank crash into fresh light.*
>
> *They reveal how Anglo Irish Bank's then chief executive laughed and joked as Ireland's economy shuddered to a halt. The tapes also reveal David Drumm speaking to a fellow senior bank executive about giving his own board 'the Ladybird' version of events.*
>
> *…*
>
> *'I kind of think it's good to give them a walk around the park of the world' he tells the Head of Capital Markets, John Bowe.*
>
> *…*
>
> *'Then I'll open up the questions and when it comes around to it and it is going to be the first question – funding – you can just say 'Look this is David mentioned this, David mentioned that, but I, look, this is actually what's going on behind the scenes…' Mr Drumm tells his executive.*
>
> *The former Anglo chief executive then tells Mr Bowe to give the board 'just a balance sheet' or 'just to give them colour'.*
>
> *…*
>
> *In his conversation with Mr Bowe on January 22, Mr Drumm indicates that he intends to gloss over the perilous state of Anglo's finances when meeting with the board.*
>
> *'When I meet them for dinner, I'll give them the Ladybird version of the movement of numbers which I gave them the last time.*
>
> *Then it's a question of they're getting a little bit of market knowledge and expertise, so we'll probably do that.'*
>
> *Earlier in the same conversation Mr Drumm also discusses the idea of burning the bank's own bondholders by buying back its own bonds at a huge discount.*
>
> *…*
>
> *During his conversation with Mr. Bowe, Mr Drumm asks if secretly buying back bonds issued to the bank's own clients would leave a bad taste.*
>
> *Mr Bowe raises a number of reservations about the idea and says: 'There's some people who might regard it as profiteering on the back of our clients' losses.'*
>
> *It's at this point that Mr Drumm considers the morality of 'burning' his own clients."*

16. An extract of the transcript dealing with this topic records Mr. Bowe saying

> *"Yeah you could I mean, in theory if you did it properly you would, what you'd do is you'd buy a smaller amount and you'd buy it quietly and you wouldn't tell anybody."*

17. One accompanying comment piece notes that Mr. Bowe was junior to Mr. Drumm and was not a director of the bank. It is stated that

> *"Ladybird books are for children. Insulting the board in front of John Bowe seems like a calculated way to undermine respect for what should be the ultimate authorities inside the bank."*

18. A separate comment piece is headed "*Latest glimpse behind scenes of bust bank will make blood boil*". Mr. Bowe is referred to in that piece, albeit in the context of what must be seen mainly as an attack on Mr. Drumm and on "morality Anglo style".

19. Apart from the references to Mr. Bowe in the articles and transcript, there are two photographs of him. Mr. Casey and Mr. Peter Fitzpatrick are not referred to. There is a photograph of Mr. McAteer but no reference to him in the text.

20. Between the 17th and 18th July, 2014, five videos were uploaded onto the website www.independent.ie. These videos are said to be of conversations between Mr. David Drumm and Mr. John Bowe in or around January, 2008. They are entitled:

> *"Keep it very quiet"*
>
> *"Nibble away"*
>
> *"Morality"*
>
> *"Ladybird version"*
>
> *"A bit sharp"*

21. The video entitled "*Keep it very quiet*" contained the following passages:-

> *"[Drumm] Now you are gone way out there, come back in. Come back in to close beside the box. You are gone to the other box now.*
>
> *So will you think about it?*
>
> *[Bowe] I will yeah*
>
> *[Drumm]In the sense of how the numbers work, the capital dilution and all that kind of stuff and we'll see what's doable but I don't want, I don't want somebody to say to me a year from now 'Did you wonder if the CMS is trading well, do you ever do a little trade on it?' and for me to go 'I never f***ing thought about that.'*
>
> *[Bowe] But what I'd want to do is keep it very quiet*
>
> *[Drumm] You'd have to."*

22. The video entitled "*Nibble away" contained the following passages*:-

> *"[Bowe] What you would do actually, the way you'd acquire it is you'd get the wealth management guys to go in and buy it so it looks like private clients…*
>
> *[Drumm] Correct, now you're catching up.*
>
> *[Bowe] Yeah*
>
> *[Drumm] That's how you do it, no problemo. Let me ask you the much more practical question; are there sellers at those levels?*
>
> *[Bowe] There are definitely sellers. There are definitely guys; there is a huge frustration about the lack of liquidity.*
>
> *[Drumm] Okay so if you were bidding early you could disguise it, you'll get a bit of it before the market cops on?*
>
> *[Bowe] I think there would be, I think the level would go up but I think that there would be willing sellers at each level.*
>
> *[Drumm] Yeah, yeah so you'd decide on what your cloth was, see how you get on. Go a bit then stop if you're not happy with the way it's going, go another bit. But you'd just, you'd just put somebody on it.*
>
> *[Bowe] Yeah, nibble away.*
>
> *[Drumm] Nibble away, yeah."*

23. The video entitled "*Morality*" contained the following passages:-

> *"[Drumm] If you, this is a wider issue which I don't even want to talk about but I must, if you go out and you take advantage of the fact that it's trading very low and you're buying people out at market levels where they bought at par, does that leave any residue?*
>
> *[Bowe] There is, there is, yeah I mean particularly because we sold it out to our own clients. There's some people who might regards it as profiteering on the back of our clients' losses.*
>
> *[Drumm] Well somebody else could buy it, so is it not better that we do?*
>
> *[Bowe] Yeah you see the thing is…*
>
> *[Drumm] It's the morality of… I don't know what the f***ing morality is. It's the morality of ' well we're not going to do it because it would be wrong of us to do it but that's the price, that's the offer price. So if they're offering it, they haven't qualified. Well we'll fucking sell it to anybody but the issuer.'*
>
> *[Bowe] Yeah*
>
> *[Drumm] You know, you can get lost in that.*
>
> *[Bowe] Yeah you could I mean, in theory if you did it properly you would, what you'd do so is you'd buy a smaller amount and you'd buy it quietly and you wouldn't tell anybody.*

[Drumm] Correct and you'd just take the trading profit.

[Bowe] And you'd just take the trading profit.

[Drumm] And it would be a small move on the needle on the capital and nobody would care."

24. The video entitled "*Ladybird version*" contained the following passages:-

"[Bowe] I've got your three balance sheets done.

[Drumm] Well done, I want to show something in front of the board at my dinner with them next week before the meetings. Are you around then Thursday for the board meeting in case I need to come in?

[Bowe] Yeah

…

[Drumm] … I think it's good to give them a walk around the park of the world.

[Bowe] Well I've done, I've done a kind of a speaking note for Friday, for the director's forum.

…

[Drumm] Well what I'm going to do is, I'm not gonna do the big, long agenda. I'm going to give a spiel, probably a rant if I get warmed up. Then I'll open up the questions so then when it comes around and it is going to be the first question – funding- you can just say 'Look, this is, David mentioned this, David mentioned that but look this is actually what's going on behind the scenes.

[Bowe] Well this is more for me than for anybody else. It just means that I can kind of deal with the issues in a kind of a logical way.

[Drumm] Exactly. That's the main point. So then for the board, I'll talk to you before the board. I'm not, I don't think there's any need for any circulation but maybe we will, we'll just decide, maybe it's just a balance sheet or maybe it's just you saying 'look your value there in the board is just the market sense', you know, and just to give them colour because I'll give them, when I meet them for dinner I'll give them the ladybird version of the movement of numbers which I gave them the last time. Then it's a question of they're getting a little bit of market knowledge and expertise from you so we'll probably do that."

25. The video entitled "*A bit sharp*" contained the following passages:-

"[Drumm] Well I, and I'm out of touch with the current accounting but I think the, my guess is knowing everything about IFRS and I've listened to it for the last two and a half years, is that they would force you to take the 40 million to P&L which is what I'd want

[Bowe] Yeah

[Drumm] I'm just thinking of cushioning, see I'm feeling terribly hard done by, as you are and the rest of us by the market on the bon book

[Bowe] Yeah.

*[Drumm] ****s giving me the whole line about 'Got to watch this, got to watch that, blah blah, it's a bit sharp.' F*** that, I'll tell you what sharp is, sharp is 400 f***ing million of losses on a bond book that we didn't create.*

[Bowe] Yeah.

[Drumm] So if there's a bit of succour that can be got from doing a semi little trade, to just take some of the pain out of it, we're actually paid to do this.

[Bowe] Yeah

[Drumm] That's our job."

26. On the 17th July, 2014, the applicant received correspondence from the solicitors acting for Mr. Bowe and Mr. Peter Fitzpatrick. A complaint was made that the publications amounted to a contempt of court with the potential to infringe their clients' right to a fair trial.

27. The Chief Prosecution Solicitor immediately wrote on behalf of the applicant to the managing editor of *the Irish Independent*. He referred to the solicitors' letters of complaint and went on to say:

"The accused have a right to a fair trial and any interference with that right is of serious concern for the Director. We have previously written to your office…I note from your website that your newspaper intends to continue to publish the contents of such purported telephone conversations and emails over the next number of days. The Director now seeks your undertaking that you will cease to publish these articles. If this undertaking is not received within thirty minutes, the Director will seek the appropriate court order this afternoon so as to protect the integrity of the trial process."

28. This was responded to by the respondents' solicitors about an hour and a half later. It was denied that anything in the articles or on the website interfered with the right to a fair trial. The complaint was made that the applicant's e-mail did not specify what aspects of the material amounted to such interference. A question was posed as to whether the applicant was demanding that no articles whatever concerning Anglo Irish should be published while trials were pending.

29. It appears that an application to the High Court for short service of the motion now before the Court had already been made. In a further e-mail that day, the respondents were informed that it had been granted. The respondents were also told that the applicant did not demand that no articles about Anglo Irish should be published. Her position was set out as follows:

> *"Your publication does not concern any broad issue of principle in relation to Anglo Irish but to a series of phone calls which are calculated to present an impression of the callers as callous and flippant in relation to the proper running of the bank. As you are aware these phone calls all involve John Bowe, one of the accused. They clearly have a capacity to create a mindset among members of the public and potential jurors adverse to him which could prejudice his trial which is fixed for the 11th of January 2016 and by extension that of his co-accused.*
>
> *As you are also aware the trial of Mr. Sean Fitzpatrick is fixed for February 2015. In the circumstances it is undesirable that gratuitous material reflecting one way or another on the conduct of the board of Anglo Irish Bank should be published lest it prejudice the jury one way or another in relation to those proceedings…*
>
> *It is the view of the Director that today's articles, both in the printed and online editions, deliberately sensationalise a supposed culture in Anglo Irish Bank which, whether true or false, is not conducive to the conduct of the proceedings in the fairest way."*

30. In an affidavit sworn that afternoon, Mr. Matthews of the applicant's office said that the applicant had carefully considered the articles and correspondence and concluded that the above facts disclosed a breach of the *sub judice* rule and/or contempt of court. It was stated that the sub-heading "*Bankers laughed and joked as financial crisis engulfed the economy*" had the tendency to create hatred towards bankers generally. Mr. Matthews averred that he believed that the article, taken as a whole, had a tendency to be prejudicial to the trial of the various accused and to the proper administration of justice. He said that it was "*calculated to, and tended to, interfere with the integrity of the trial process"* and that it was published at a point in time when, to the knowledge of the respondent, the various accused were before the courts charged with criminal offences.

31. In a second affidavit sworn four days later Mr. Matthews deals with the videos and sets out transcripts of the extracts referred to above. He says that on the 18th July, 2014, he received a further complaint, in respect of this material, from the solicitors acting for Mr. Bowe and the office accordingly wrote again to the respondents.

32. He averred that the tapes were obtained improperly and in breach of confidence, in circumstances where there was no legitimate avenue by which the respondents could have obtained them. He further says that publication of them is a breach of the *sub judice* rule and/or a contempt of court. It is his belief that, when taken together, the videos have a tendency to be prejudicial to the trial of the accused and to interfere with the proper administration of justice. Publication of them was calculated to, and tended to, interfere with the integrity of the trial process.

33. In a replying affidavit, Mr. Rae refers to the earlier correspondence from the applicant and states that, notwithstanding the complaints made at the time of the publication of the first series of Anglo tapes, the prosecutions in train at that time proceeded to full trial and determination without any risk to the integrity of the trial process.

34. It is pointed out that the publications now complained of do not mention the transaction which is the subject matter of the pending criminal charges. The main subject of the articles was Mr. Drumm, and the conversations on the tapes occurred some eight months before the transaction. Publication of the material took place about a year and a half before the scheduled trial date.

35. It is contended that the manner in which the respondents obtained the tapes is covered by "journalistic privilege" and is in any event irrelevant to the issues before the Court.

36. In relation to Mr. Matthews' assertion that the material had a tendency to "*create hatred towards bankers generally",* Mr. Rae says that having regard to the events of recent years it is not sustainable or reasonable to suggest that the potential members of any jury would not have already formed their own view in relation to bankers generally and bankers from Anglo Irish in particular. He says that the behaviour of bankers has been the subject matter of every section of the Irish media since at least 2008. He refers to, and exhibits extracts from, the following books published on the topic: "*How Ireland Really Went Bust*" by Matt Cooper, "*Anglo Republic*" by Simon Carswell, "*Bust*" by Dearbhail McDonald, "*The Bankers*" by Shane Ross TD, "*The Untouchables*" by Shane Ross TD and Nick Webb and "*Who Really Runs Ireland*" by Matt Cooper. Each of these books discusses the 2008 transaction.

37. Mr. Rae says that the respondents take their position as publishers very seriously and would never under any circumstances intentionally publish any material which tended to prejudice the administration of justice.

38. In response, Mr. Matthews has sworn a further affidavit in which he says that no action was taken on foot of the earlier complaints by his office because it had been hoped that the communications in themselves would be sufficient. He repeats that the tapes must have been improperly obtained, in that they must have come either from the Garda Fraud Bureau investigation file or from discovery in civil litigation between the Quinn family and Anglo Irish. He says that this is relevant because it is a factor in considering any claim by the respondents to be exercising their right to freedom of expression.

39. It is asserted by Mr. Matthews that the publications in question portray Mr. Bowe and Mr. Drumm as

> *"acting in a manner suggestive of secrecy and conspiracy and portrays an overall negative impression of the Bank and what is implied to be John Bowe's immorality/lack of decency/lying in relation to same. These conversations have no real context and appear to have been deliberately selected excerpts from conversations [sic] from selected telephone conversations designed to show John Bowe in a particular light and designed to suggest that the affairs of the Bank were being carried out in a dishonest way by some of its senior officers."*

40. It is stated to be the belief of the applicant that the publications have a tendency to create a further and stronger negative sensationalised ill-feeling towards the bankers including Mr. Bowe by associating him with the phrases quoted above.

The reliefs sought

41. The notice of motion dated 17th July, 2014, sets out the grounds upon which the reliefs are sought and are as follows:

> *"The material contained in the article clearly tended to prejudice the proper administration of justice in respect of the criminal trials currently pending against former officials of Anglo Irish Bank. The article is calculated to, and tended to, interfere with the integrity of the trial process by publishing the information at a point in time at which the accused had*

been charged, and the Respondent knew this to be the case. In all of the circumstances the article amounts to a breach of the sub judice *principle and amounted to a contempt of court. Full details of the contempt are set out in the grounding affidavit of Henry Matthews herein.*

Any further publication of material in or relating to the "Anglo tapes" will create a real risk of interfering with pending trials against former officials of Anglo Irish Bank."

Issues in the case

Relevance of the earlier correspondence

42. The respondents submit that the respondent must be seen as having made a conscious decision to take no action in relation to the publication of the first series of Anglo tapes and related material. It is suggested that the content and comment in relation to that material made more serious allegations against executives of the bank than anything now complained of, and mentioned Mr. Bowe by name in that context. It is accepted that he had not been charged at that time, but the publication remained on the website and the applicant never requested that it be taken down.

Relationship between the content of the publication and the criminal charges

43. On behalf of the applicant, Mr. O'Higgins SC accepts that the material in question does not refer to the transaction to be considered in the criminal trial. However, he says that the trial will be concerned with allegations of dishonesty, secrecy, bad faith, covertness and deception of the public in relation to Anglo Irish. These are matters that will go towards the case to be made by the applicant to establish *mens rea* on the part of the accused. Publications which tend to suggest that a particular accused has acted in a covert and deceptive manner, and was cavalier in relation to the pain and distress caused by the bank's situation, could therefore go directly to matters in issue.

44. The applicant submits that the subheading in the publication "*had the tendency to create hatred towards bankers generally."*

45. The applicant also alleges that these were deliberately selected excerpts from conversations, designed to show the speakers in a dishonest light and designed to suggest that the affairs of the Bank were being carried out in a dishonest way by some of its senior officers. It is further suggested that these extracts were not selected at random but instead "*for their particular impact*" and that the headings chosen were designed to emphasise the intended impact of the tapes.

46. The applicant accepts that the accused cannot expect to be tried in a vacuum. However, if there is to be a criminal trial it must be conducted in circumstances that are as fair as possible. Bankers may have been the subject of extensive debate but that does not put them beyond the protection of the law. The reference to "*making the blood boil*" could only have the effect of encouraging feelings of hostility towards persons such as these accused.

47. In relation to the material published, Mr. O'Moore SC makes the following points:

- That the material contained no reference to either the transaction itself or the other bank involved in it.
- That Mr. Bowe is seen in the material as being subordinate to Mr. Drumm (which was correct as a matter of fact) and as being asked or told what to do by him.
- That Mr. Bowe was seen to raise concerns about the morality of a proposed course of action, provoking an outburst from Mr. Drumm on the nature of morality.

48. It is remarked that the applicant did not, in her correspondence, make any mention of the headlines.

Lapse of time between publication and trial date

49. The applicant says, in reliance on the judgment of the Supreme Court in *DPP v. Independent Newspapers (Ireland) Ltd. & Ors*. [2008] 4 I.R. 88, that the period of time between the date of publication and the anticipated trial, is not relevant to the issue before the court. The so-called "fade factor" is of relevance when a court is considering an application to prohibit a trial on the grounds of prejudicial publicity but has no role in determining whether a publication amounts to contempt of court. That question must be answered by reference to the circumstances at the time of publication.

50. The respondents say, referring to the fact that a trial earlier this year resulted in the acquittal of a senior figure from Anglo Irish, that it is simply fanciful to suggest that a juror in January 2016 would be in any way adversely affected by what was published in July 2014.

Intent of the publishers

51. On behalf of the respondents, Mr. O'Moore SC takes issue with any suggestion by the applicant that they might have intended to gratuitously interfere with the criminal process and points to the fact that no application was made to cross-examine Mr. Rae on his affidavit.

52. Relying on *Health Service Executive v. L.N. & Ors.* [2012] IEHC 611, it is submitted on behalf of the applicant that the *mens rea* for the offence of contempt does not have to include an intention or desire to interfere with the administration of justice. Neither belief that the material is innocuous nor ignorance of its significance is a defence, although these are matters that may go to penalty.

Relevance of the source of the material

53. The applicant says that when the court is balancing the due administration of justice against freedom of expression, it is relevant that the respondents obtained the material unlawfully and in breach of confidence. The publications do not expose criminality, which might constitute a defence to injunctive or defamation proceedings, but create a risk to the process whereby the applicant seeks to prosecute allegations of criminal conduct. It is accepted, in this context, that the entitlement to confidentiality does not inhere in the applicant.

54. In this context the argument is also made that, in so far as the respondents seek to rely on the concept of journalistic privilege, such a concept is not known to Irish law.

55. The respondents point out that the Court is not being asked, in this application, to vindicate the right to confidence of any person. The DPP is not the owner of the tapes. No issue about journalistic privilege arises for determination.

Relevance of commentary published by others

56. It is suggested by the respondents that over the last number of years Anglo Irish Bank has had possibly the highest level of scrutiny and adverse publicity of any institution in the history of the State. Apart from press scrutiny, there have been several books, a film (in which the phrase "Ladybird version" is used) and a musical. The argument is made that these publications serve as an indicator for what the applicant finds to be consistent with a fair trial, since no action has been taken against them. Unlike the respondents' material, the books referred to deal specifically with the transaction.

> *"Irish bankers in general, and the bankers most centrally involved in the creation of the crisis, are household names and have been the centre of topical debate and discussion in this jurisdiction in every media form since in or about 2008."*

57. In answer to a query from the court as to the date of publication of the various books, Mr. O' Moore said that while they might have been launched before the accused were charged, it is as true of criminal law as it is of copyright law to say that every individual sale is a publication, and ongoing sales can therefore be restrained. If the applicant felt that the books were prejudicial to the proper atmosphere of a trial she could have moved against the bookshops or publishers.

58. On behalf of the applicant, Mr. O'Higgins notes that publications that pre-dated the charges could not give rise to a charge of contempt. In considering whether a post-charge publication creates a real risk to the integrity of the trial process, and whether injunctive orders should be sought, the applicant has to bear in mind issues of proportionality. It is asserted that there is "a quantum difference" between *The Irish Independent* and the books referred to, which he describes as "niche publications". The articles in question were presented as relating to "major news" and as containing material not previously in the public domain.

Relevant authorities

59. The case of *Desmond v. Glackin (No.1)* [1993] 3 I.R. 1 has been cited by the respondents in relation to the appropriate test for contempt. In that case, the applicant had obtained leave to seek judicial review in the standard manner of making an *ex parte* application. The second named respondent gave a radio interview the following day in which he expressed his views about the merit of the case in trenchant fashion. An application to have the second named respondent attached and committed was dismissed by O'Hanlon J. In reaching this decision, he held that the interview did not give rise to the offence of "scandalising the court" (a form of criminal contempt). Neither was it of such a character that it gave rise to a real or appreciable risk that the outcome of the pending proceedings would be prejudiced thereby.

60. A further submission had been made on behalf of the applicant to the effect that the respondent's utterances had exposed him to public obloquy because he had taken court proceedings and this amounted to contempt. O'Hanlon J. said that the respondent should have chosen his words more carefully. However, he went on at p. 33:

> *"We are here dealing with an ongoing matter of public interest which has occupied the minds of the public for many months past. In this situation, and particularly in the context of the second respondent's utterances being a response to serious allegations made against him by the first applicant which had already been well publicised, I consider the case falls well within the scope of the exceptional situations referred to by both Lord Reid and Lord Simon of Glaisdale in the Attorney General v. Times Newspaper Ltd. [1974] A.C. 273 where 'the law strikes [the balance] in favour of discussion'. I also apply the dictum of Lord Morris in the same case when he said, 'If a court is in doubt whether the conduct complained of amounts to 'contempt' the complaint will fail'."*

61. However, in relation to that last aspect, a somewhat different approach seems to have been taken by the Supreme Court in *Kelly v. O'Neill* [2000] 1 I.R. 354. This was a case stated where the primary issue was whether or not the publication of material about an accused person after conviction by a jury, but before sentencing by the trial judge, could potentially amount to contempt. In answering the questions posed and holding that there could be contempt, the Court was concerned largely with the question of whether a judge could be capable of being influenced by prejudicial publicity, or might be perceived as having been so influenced, if the contempt jurisdiction did not apply. However, the judgments make it clear that the test for contempt is whether the publication complained of was "calculated to interfere with the course of justice". It is not necessary to establish that it did in fact result in such interference.

62. The following broader passages from the judgments have been cited as relevant to the issues before this court.

63. At p. 369, Denham J. observed:

> *"Media reporting of events in society, including court cases, has increased in this, the 'information age'. Coverage varies from national broadsheets, tabloids, television and radio to similar publications from organisations which sweep the globe. And then there is the internet! People are exposed to national and international media. Such coverage should be a fair balance between protecting the administration of justice and the right of freedom of expression. If there is a doubt the balance should be tipped in favour of the administration of justice, of a fair trial.*
>
> *The common law offence of contempt of court is largely judge-made. It is to protect the administration of justice for the individual and the community. A balance is sought to support the requirement of a constitutional democratic society wherein there is the rule of law and trials are conducted in court. Such a balance does not preclude criticism of a decision, including sentence, after sentencing. Nor does it preclude such comment after sentence even though there may be an appeal. A key factor is the proximity of the court process."*

64. At p. 370 she continued:

> *"Freedom of expression is not an absolute right under the Constitution, however it is a fundamental right of great importance in a democratic society. In striking a balance between that right of freedom of expression and the administration of justice if there is a real risk of an unfair trial the balance should tip in favour of the administration of justice and the determination of a contempt of court. Also, if there is doubt the balance should swing behind the protection of the administration of justice."*

65. Keane J. said at p. 381:

> *"The courts have always considered themselves empowered to treat as contempt of court breaches of the* sub judice *principle in the case of criminal jury trials. This court has pointed out on a number of occasions in recent times that the courts should not underestimate the capacity of a modern jury to approach its deliberations in a properly impartial manner and to ignore press comment, however unbalanced and even hysterical. But the power to punish such a contempt remains, because of the clear danger that such comment might be seen as being capable of influencing the jury's verdict, not least by the person who is on trial. It is, in short, a common law machinery, essential in the absence of any appropriate legislation, designed to protect the constitutional right of the accused person to a trial in due course of law guaranteed by Article 38.1 of the Constitution."*

66. It may be noted that Keane J. expressed some doubt as to whether the generally accepted view, that contempt is an absolute offence with no requirement for proof of *mens rea*, was good law.

67. In *D.P.P. v. Independent Newspapers (Ireland) Ltd.* [2009] 3 IR 598 Hardiman J. made the following observations (at p. 600 - 601 of the report):

> *"Although not frequently exercised, it is absolutely essential that the courts should possess a jurisdiction to protect the integrity of their proceedings against loud and plangent assertions of the guilt (or innocence) of a person against whom proceedings are pending, long before the trial begins. There is clearly a case for the Oireachtas to consider whether, as has been done in the neighbouring jurisdiction, the complex and in some respects archaic common law of contempt should not now be placed on a statutory basis."*

68. The same decision deals with the "fade factor" and establishes that it is not relevant in the context of contempt of court. At p. 601 it is said that:

> *"It may be a matter of great significance on an application to prohibit a trial on the ground of prejudicial publicity, but that is an application of quite a different sort from the present. The question of whether a publication is or is not a contempt of court falls to be decided as of the time it was published and to that issue the fade factor is not relevant at all."*

69. The issue of *mens rea* in relation to a charge of contempt was considered in *Health Service Executive v L.N. & Ors*. [2012] IEHC 611. The case concerned a conviction in the District Court of a number of newspaper editors for publishing material tending to disclose the result of child care proceedings. In the appeal by way of case stated submission was made that it was necessary to establish *mens rea* for the offence to be made out. After a thorough review of the authorities, Birmingham J. held that, notwithstanding the doubts expressed by Keane J. referred to above, the established and traditional jurisprudence was to the effect that intention or reckless indifference as to the result of the publication was not required. It was not claimed that the publication was accidental, that it was believed to be innocuous or that it had a significance of which the editors were unaware.

Discussion

70. The question for the court is whether or not the publications complained of are calculated to interfere with the course of justice by creating a real risk of an unfair trial. It is clear from the authorities cited that this question is to be answered without reference to the intentions of the respondents and without reference to the expected lapse of time between the date of publication and the date of trial.

71. The court fully accepts that the seismic events that have so drastically affected the economy of this State in recent years, and the central role played by the financial sector in those events, are proper subjects for full public debate, analysis and comment. It would be both wrong and futile for the courts to attempt to impose a general limitation on such discussion by reference to the ongoing investigations, whether civil or criminal, or by reference to standards of sobriety and taste. Thus, I do not accept as a valid criticism of the publications in question the possibility that they would encourage "hatred of bankers" in circumstances where persons who are or were bankers may yet be charged and come to trial.

72. However, where an individual has actually been charged and his trial is pending before the courts, the focus of the courts must be on the obligation to provide for a fair trial in accordance with law.

73. The law of criminal contempt is part of the machinery available to further this objective and becomes applicable once the charge has been laid. It is clear from the judgments on prejudicial pre-trial publicity, such as *O'Brien v. D.P.P.* [2014] IESC 39, that the Director of Public Prosecutions has a duty to bring contempt proceedings where that is considered necessary to protect the trial process. I accept that, when making a decision as to the appropriateness of such proceedings, the Director is entitled to a measure of discretion. Proportionality is a proper factor to be taken into account.

74. In the instant case, I find the compelling feature to be the fact that Mr. John Bowe stands charged with offences of dishonesty and conspiracy arising from his employment as an executive in Anglo Irish. On dates after the bringing of those charges, he was featured prominently in a series of article and videos, a recurring theme of which is dishonesty, cover-up and deceitfulness amongst the executives in Anglo Irish.

75. I do not consider the fact that the concentration of the writers is largely on Mr. Drumm to be particularly relevant in these circumstances, especially given the conspiracy charge. An advocate for Mr. Bowe might well make the case that he is to be seen as playing a subordinate role, but that is more likely to be a matter for mitigation than guilt or innocence. In any event, this line of argument merely serves to underscore the fact that the articles could just as well have been published without naming Mr. Bowe.

76. The fact that the conversations reported upon took place months before the transaction is also of no great moment given that the conspiracy is alleged to have commenced from as early as March, 2008.

77. In my view, the publication of other material, relevant to the same events, by other authors cannot assist the respondents. I am not in a position to endorse the view of the applicant that these were "niche" publications in comparison with the respondents' newspaper, since there is no evidence before the court as to what the cumulative sales of the books were. However, the date of publication is obviously a key factor. There could be no contempt before charges were brought. The bringing of the charges could not, clearly, render criminal a publication that was lawful when carried out. I am not convinced that the copyright analogy in relation to continued sale is necessarily appropriate in this context.

78. In any event it is well established law that a decision by the applicant to bring a prosecution against a particular person or entity is reviewable only on the limited basis identified by the Supreme Court in *Eviston v D.P.P.* [2002] 3 I.R. 260. It is in general no answer to a criminal charge to say that others are guilty of similar offences but have not been charged, unless perhaps the defence can point to some *mala fide* reason for the differentiation. Further, it is not correct to suggest that the court must take it that, if there is no prosecution, the applicant considers that there has been no contempt and, further, that the court should take the same view.

79. In the circumstances I find that the respondents have committed the contempt charged. On a date after Mr. Bowe was charged, they set out to associate him with aspects of the so-called "Anglo morality" in a way that was capable of having a direct bearing on the crimes of dishonesty and conspiracy with which he is charged.

80. For the sake of completeness, I should say that I do not find any evidence of intention to interfere with the criminal process. I should also say that in the context of this case, I do not find that the source of the material is of any relevance for the reasons argued by the respondents.

Summary and conclusions
In order to avoid the creation of any fresh prejudice to the pending criminal trial, the body of this judgment may not be reported upon in any detail until further order, which will occur after the trial. This section of the judgment may be reported and will be placed upon the Courts Service website, on the basis that the court has dealt with the trial of a criminal charge in open court and will be pronouncing its verdict in open court.

In this application the Director of Public Prosecutions seeks orders of attachment, committal and sequestration as against the respondents. The basis for the application is the publication of certain material relating to an individual who is currently awaiting trial by jury in the criminal courts.

Having considered the evidence, submissions and relevant authorities I am satisfied beyond reasonable doubt that the respondents have committed the offence of contempt of court. I reach this conclusion because I am satisfied that the publication, which was made after the accused had been charged and returned for trial, gratuitously identified and associated the accused person with particular types of behaviour relevant to the charges to be considered by the jury.

I have not accepted the argument put forward by the defendants that the lapse of time between publication and trial means that there is no risk to the fairness of the trial. The authorities on this issue are clear – such lapse of time may be relevant where an accused seeks to prohibit a trial on the basis of prejudicial publicity, but has no bearing on the question of contempt. The relevant date here is the date of charge, and the publication here undoubtedly occurred after the charges were brought.

I have also not accepted the case made that other persons have published material relevant to the criminal charges without action being taken by the Director. This is primarily because it is no defence to a criminal charge to say that other persons have committed similar offences and have not been charged, unless there is evidence of *mala fides* on the part of the prosecutor.

I have accepted that there is no evidence of intention on the part of the respondents to interfere with the course of justice. However, on the law as it stands there is no requirement to prove intent for this offence.