Neutral Citation Number: [2011] IEHC 505

THE HIGH COURT

COMMERCIAL

2011 8022 P

BETWEEN

ALLIED IRISH BANK PLC, AIB CAPITAL MARKETS PLC, ALLIED IRISH BANKS INTERNATIONAL FINANCIAL SERVICES LIMITED, AIB ADMINISTRATIVE SERVICES LUXEMBOURG S.A.R.L., AIB HUNGARY ADMINISTRATIVE SERVICES KFT, AIB ADMINISTRATIVE SERVICES SCHWEIZ GMBH, AIB ADMINISTRATIVE SERVICES NEDERLAND B.V.

PLAINTIFFS

AND

PAT DIAMOND, AIDAN FOLEY, GERRY MCEVOY, DEREK O'REILLY, ANDREW O'SHEA, JOE WALSH, CENTRALIS S.A., CENTRALIS SWITZERLAND GMBH, CENTRALIS HUNGARY KFT, AND NANCYAN S.A.

DEFENDANTS

JUDGMENT of Mr. Justice Clarke delivered on the 14th day of October, 2011

1. Introduction

1.1 The backdrop to these proceedings is the collapse of the Irish banking system in recent years. As is well documented, the first named plaintiff ("AIB" which term also, where the context admits, applies to the plaintiffs collectively) suffered severe difficulties which resulted in the bank becoming almost wholly owned by the State. Without State support it seems unlikely that AIB could have survived. As part of the strategy to place AIB back on a sound financial footing, a general policy of seeking to recapitalise by means of the sale of non-core assets has been adopted. In addition, there has been significant public controversy over the payment of bonuses to employees in banks which have been in receipt of significant State aid. Aspects of both that bonus issue and the strategy of the sale of non-core assets form part of the backdrop to these proceedings.

1.2 The third named plaintiff ("AIB IFS") and the fourth, fifth, sixth and seventh named plaintiffs (respectively "the Luxembourg Company", "the Hungarian Company", "the Swiss Company" and "the Dutch Company" and collectively "the operating companies") have operated as a unit within AIB providing particular services in relation to international financial business to which it will be necessary to refer in more detail in due course. It is also of some note that the second named plaintiff ("AIB Capital Markets") is the immediate parent of AIB IFS and the operating companies.

1.3 As part of its strategy for the disposal of non-core assets, AIB and AIB Capital Markets decided to attempt to sell AIB IFS and the operating companies. Some of the senior employees of those companies became involved in a proposal for a management buy out ("MBO") of AIB IFS and the operating companies. There was, however, a third party offer which came from the Capita Group ("Capita"). Ultimately, Capita was declared to be the preferred bidder and it engaged in a due diligence process. It would appear on the evidence currently available that a reduction in the price which Capita was prepared to pay, of the order of €22m, occurred in or around this time. The circumstances leading to that reduction and the factors which might have justified same are a matter of some controversy. However, AIB asserts that the principal, if not the exclusive, reason for that reduction was a plan implemented by each of the defendants which was designed to move as much as possible of the business of AIB IFS and the operating companies into the seventh to tenth named defendants ("Centralis" unless the context otherwise requires). The terms on which it is alleged that it was contemplated that that business might be moved was that relevant AIB personnel would themselves leave their employment with AIB and take up employment with a relevant Centralis entity. In addition, it is said that arrangements were contemplated whereby the same personnel would become entitled to a significant shareholding in Centralis dependent on the amount of early new business which could be said to have been brought to Centralis by those individuals. On AIB's case it is said to be clear that most if not all of the anticipated new business was likely to come from attracting customers of AIB IFS to Centralis.

1.4 Against that background, AIB seeks a series of interlocutory orders directed principally towards restraining all of the defendants from soliciting AIB IFS customers, concluding contracts with such customers, preventing the solicitation of AIB employees and precluding the use of what is said to be confidential information allegedly brought to Centralis by those employees. In addition, certain orders relating to the return of what is said to be confidential information are sought. As the procedural history of this case is of some relevance to the issues which I now have to decide, I propose to start by setting out a brief account of the progress of these proceedings to date.

2. Procedural History

2.1 The proceedings were issued on the 6th September last. On the same day, AIB sought and obtained a limited interim injunction from this Court (White J.). That order was concerned simply with the preservation of what were said to be confidential materials. A return date for an interlocutory hearing at which wider relief would be sought was given as the 20th September. When the matter came before me on that day, most of the defendants sought time to put in replying affidavits. In fairness, it should be noted that the sixth named defendant ("Mr. Walsh") had filed an affidavit and was willing to have the interlocutory application go ahead on that day. However, in addition, it was intimated on behalf of the fifth named defendant ("Mr. O'Shea") that he wished to move to have the interim injunction set aside on the grounds of material non-disclosure. In all the circumstances, I directed that the matter be adjourned to the next commercial list, which was due to be heard before Kelly J. on the 27th September, and gave liberty to issue the motion to set aside the interim injunction to which reference has already been made. When the various motions came before Kelly J., the same were adjourned for hearing to commence before me on the 3rd October last along with various directions for the filing of additional evidence.

2.2 There were, however, two further developments. Kelly J. was told that the parties might engage in mediation. Mediation did occur

on, as I understand it, Friday the 30th September, but was unsuccessful. However, arising, it is said, out of certain discussions which took place in the course of that mediation an affidavit was filed by the first named defendant ("Mr. Diamond") setting out his account of the facts relevant to the issues between the parties. I was told, by counsel on behalf of AIB and also by counsel on behalf of Mr. Diamond, that the circumstances in which that affidavit came to be sworn arose out of a desire on the part of AIB that factual matters that were alluded to in the course of the mediation process should be confirmed on affidavit by Mr. Diamond. I was further told that, in the event that Mr. Diamond was to provide such affidavit evidence, it had been agreed that the interlocutory application between AIB and Mr. Diamond could be dealt with on the basis of certain undertakings which were ultimately given to the court by Mr. Diamond through counsel and which involved an acceptance on the part of Mr. Diamond that he would not become involved in Centralis. It was also intimated that, in certain circumstances, the proceedings as and between AIB and Mr. Diamond might be struck out. In those circumstances AIB sought to rely on Mr. Diamond's affidavit. Having heard counsel on all sides, I ruled, for reasons which I have set out in an ex-tempore ruling delivered on the 3rd October, that the relevant affidavit evidence could be admitted provided that each of the other parties were given an opportunity to file a further affidavit in response. Such responses were, in fact, filed. In those circumstances, the interlocutory application against Mr. Diamond did not proceed and Mr. Diamond has given the relevant undertakings to the court.

2.3 In addition, it should be noted that AIB also appeared, while the interlocutory hearing was in progress, to have resolved its differences with Mr. O'Shea, such that Mr. O'Shea withdrew his application to discharge the interim injunction and AIB were content that the matter as and between AIB and Mr. O'Shea could also be dealt with on the basis of certain undertakings. The interlocutory injunction against Mr. O'Shea did not, therefore, proceed either.

2.4 In substance, therefore, what remains for decision is the interlocutory application as against the second, third and fourth named defendants (respectively "Mr. Foley", "Mr. McEvoy" and "Mr. O'Reilly") who are represented by one counsel, Mr. Walsh who was separately represented, and Centralis who also had their own representation. I propose to refer to Mr. Foley, Mr. McEvoy, Mr. O'Reilly and Mr. Walsh as the "personal defendants". Given the somewhat unusual circumstances in which Mr. Diamond's affidavit came to be before the court, there was some debate as to the weight which I should attach, in the context of this interlocutory application, to the evidence given by Mr. Diamond in that affidavit. That is an issue to which I will return.

2.5 However, in the course of the debate between the parties at the interlocutory hearing, there was a significant clarification of the true issues between the parties. It seems to me to be appropriate to move on, therefore, to set out the precise issues which emerged in the course of that hearing and to which this judgment is directed.

3. The Issues

3.1 I have already briefly outlined the orders which AIB seeks. With the exception of the order relating to the handing over of certain materials, each of the other orders amount to what are sometimes referred to as "springboard" injunctions. In order to understand the issues which arise between the parties it is necessary, at this stage, to say a little about the nature of springboard injunctions.

3.2 Most interlocutory injunctions seek to preserve the position of the parties pending a full hearing at which the court is likely to consider whether the plaintiff is entitled to a permanent injunction in much the same terms as the interlocutory injunction which is sought. While there may, for practical reasons and on the facts of individual cases, be some difference between the nature of the order sought at an interlocutory stage and those which might, if the plaintiff be successful, be granted after a full trial, nonetheless there is ordinarily a close connection between the temporary or interlocutory order sought and the permanent order which the plaintiff might be entitled to in the event that the plaintiff succeeds at trial. Thus, a plaintiff who alleges trespass may hope to secure a permanent injunction at trial preventing such trespass but may seek a temporary interlocutory order pending trial in much the same terms. However, springboard injunctions are different.

3.3 The underlying rationale for the grant of a springboard injunction stems from the need to deal in a fair and just manner with the consequences which may flow from employees acting in breach of contract or in breach of a fiduciary duty in a way which gives those employees an opportunity to obtain a head start in competition with their employer in circumstances where the relevant employees leave their employment and either set up on their own in opposition to their former employer or join a competitor. It should be emphasised that a springboard injunction is wholly different in character from an injunction which seeks to enforce a restrictive covenant in an employee's contract of employment which prevents that employee from competing (within defined parameters) with an employer after the employee's contract with that employer comes to an end. There is, of course, an extensive jurisprudence as to the extent to which such clauses are valid having regard to whether any clause under consideration might be said not to be over wide or only designed to project the legitimate legal interests of the employer. However, no such clauses are to be found in any of the contracts of employment which are relevant to these proceedings. At the level of principle, none of the personal defendants are precluded from competing with AIB once they leave AIB's employment. Obviously, as there are no such clauses, then the question of the extent to which it might have been permissible for AIB to restrict competition does not, of itself, arise.

3.4 However, AIB's case is that the personal defendants took actions, whilst still employees of AIB and in breach of their contracts of employment, which actions, it is said, gives Centralis an opportunity to obtain an advantage, by the use of confidential information and by taking advantage of the alleged breach of contract, so as to give it a head start in competing with AIB.

3.5 It will be necessary to analyse the jurisprudence in respect of springboard injunctions in due course. However, for present purposes it is sufficient to note that all counsel were agreed that a springboard injunction cannot be used to obtain a restraint on competition as such. An over broad restraint on competition would not, of course, be permissible even if relevant clauses were included in the contracts of employment concerned. On the facts of this case, there were no such clauses in any event. It is clear that AIB cannot achieve, by the back door of a springboard injunction, the benefit of permissible restraint clauses which AIB had not previously sought to have included in the relevant contracts of employment.

3.6 Indeed, one counsel, doubtless aware of the extra judicial interests of the trial judge, made the analogy that the springboard injunction provides the court with a jurisdiction similar to that which allows a horse to be handicapped but not disqualified. That is, indeed, the point. The springboard injunction can only be directed towards putting in place a reasonable measure or measures which are designed to take away an illegally obtained advantage. The measures cannot go beyond that which is reasonably necessary to achieve that end. It cannot be directed towards preventing competition as such.

3.7 In those circumstances, it is unlikely in the extreme that most aspects of a springboard injunction could be open-ended. Rather, whatever measures are deemed appropriate will be limited in time so as to amount to a proportionate response to the illegally obtained advantage. That point draws attention to one of the difficulties with the springboard injunction. Given that such an injunction is likely to be limited in time, there is every chance that all, or a substantial part, of the time covered by a springboard injunction will occur before the trial of the action. There is a very real sense in which the interlocutory injunction will, in those circumstances, deal with a

significant part of the action itself. In *NWL Ltd. v Woods* [1974] 1 WLR 1294, at 1307, Lord Diplock suggested that in cases where a decision at the interlocutory stage would put an end to the action the court may have to consider the strength of each party's case. The relevant passage is in the following terms:

> "Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial, is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other."

While it may not strictly be the case that the interlocutory decision brings the case to an end the grant of a springboard injunction at the interlocutory stage has some similarities to such cases. It will, of course, be the case that a plaintiff will be required, if obtaining a springboard injunction, to give the usual undertaking as to damages. If the interlocutory order is made and the plaintiff ultimately loses at trial, then the plaintiff will have to compensate the defendant or defendants for the consequences of the injunction being in place. However, in many cases it may be that most of the maximum period, for which it might reasonably be contemplated that the plaintiff might be entitled to a springboard injunction, will have elapsed before the trial is concluded and judgment given. In those circumstances the judgment may be more about whether, with the benefit of full evidence and argument, the interlocutory order was justified or not with the plaintiff being entitled perhaps to some damages and perhaps to some relatively short further injunctions in the event of succeeding, but being obliged to compensate the defendant on the plaintiff's undertaking as to damages, in the event of losing. It seems to me that that curious feature of the springboard injunction is a matter that needs to be kept in mind in balancing the legitimate interests involved in relation to the grant or refusal of an interlocutory injunction.

3.8 Against the background of that analysis, it should be recorded that AIB argues that the facts of this case come squarely within the parameters of the circumstances in which a springboard injunction is justified. It is said that there is a fair issue to be tried on both the facts and the law to the effect that the defendants were guilty of breach of contract in the case of the personal defendants and commission of a tort in the case of the Centralis defendants. It is said that damages would not be an adequate remedy and it is said that the balance of convenience favours the grant of the injunction.

3.9 While certain aspects of the position adopted respectively by the separate personal defendants were referable to the specific case as against that defendant, there was no conflict between the positions adopted. Where necessary I will turn to the position of the individual personal defendants in the course of considering the issues. However, the following overview provides a summary of the questions raised.

3.10 First, it is argued (principally on behalf of Centralis but also, insofar as material, on behalf of all of the other defendants) that the law to be applied in considering the obligations of the defendants, having regard to Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17th June, 2008, on the law applicable to contractual obligations ("Rome I") and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11th July, 2007, on the law applicable to non-contractual obligations ("Rome II") is not the law of Ireland but rather is the law of the individual countries in which each relevant personal defendants was actually working or, in the case of Centralis, the law of the countries in which each of the respective corporate defendants is established. On that basis it is said that there was no evidence before the court that any of the alleged actions of the defendants were in breach of the law which, it was argued, was applicable.

3.11 Arising out of that argument, two real questions arose which remain for decision. First, counsel for AIB, in reply, argued that the question as to applicable law was simply part of the question as to whether there was a fair issue to be tried. On that basis it was contended that all that I needed to be satisfied of at this stage was that there was an arguable case or fair issue to be tried to the effect that Irish law was applicable and that, applying Irish law to those facts for which there was also an arguable case, AIB had satisfied the fair issue to be tried test. Counsel for Centralis (supported by counsel for the respective personal defendants) argued that the question of the applicable law was a so called threshold question which needed to be determined definitively at this stage. On the basis that no evidence was put before the court by AIB as to the relevant law of any of the other jurisdictions (that is, Luxembourg, Hungary, Switzerland and the Netherlands), it was said that, in the event that I concluded that the laws of those countries or any of them were the relevant law, then there was just no evidence from which I could conclude that there was a fair issue to be tried. That argument seemed to me to be correct insofar as it went. In other words, if Centralis is correct in their contention that I should definitively determine the applicable law at this stage and that I should determine that the applicable is not that of Ireland, it would follow that there was insufficient evidence to warrant a finding that AIB had made out a fair issue to be tried for there would, in those circumstances, be no evidence as to the law by reference to which the facts were to be judged.

3.12 In those circumstances, two issues seem to arise under the applicable law question. The first is as to whether questions as to the applicable law are threshold questions (as Centralis alleges) or are simply part of the general consideration as to whether a fair issue to be tried has been made out (as AIB suggests). In either case it is necessary to determine either what the applicable law is (in the event that Centralis is correct on the first question) or whether there is a fair issue to be tried that the applicable law is that of Ireland (in the event that AIB is correct on the first question). I will turn shortly to an analysis of the legal issues which arise under the applicable law question.

3.13 It is obviously possible, depending on the answer to that question, that same might amount to a knock out blow in favour of the defendants. However, should that not be the case then a further series of issues arise on the hypothesis that I am to approach this interlocutory injunction on what I might loosely describe as traditional interlocutory injunction principles with the appropriate variations that apply in the case of springboard injunctions.

3.14 The position of the various defendants was somewhat different on the extent to which a fair issue to be tried had been made out, most particularly on the facts. I will turn to the detail of those questions in due course. In addition, there were disputes between the parties as to whether damages could be said to be an adequate remedy or otherwise where the balance of convenience lay. In particular, counsel for Centralis placed reliance, in that context, on the fact that any order made would have, as a consequence, an interference with the ability of Centralis to compete outside Ireland with operational entities of AIB (or, indeed, of Capita should the sale to Capita close). It should, however, be noted, in that context, that none of the defendants argued that this Court did not have jurisdiction to deal with these proceedings under the provisions of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (otherwise the "Brussels I Regulation").

3.15 As the applicable law question is, at least to some extent, in the nature of a preliminary point it seems to me that I should turn first to that question before addressing some general observations as to the criteria for the grant of an interlocutory injunction and then applying those criteria to the circumstances of this case. It will, of course, be necessary to deal with the facts in a little more

detail in the course of applying the relevant criteria to the facts of this case. However, given that it was accepted on all sides that the court does not attempt to resolve disputed questions of fact at an interlocutory stage, it is not, in those circumstances, necessary to engage in the sort of exhaustive examination of the evidence and the inferences which that evidence might bear which would be necessary at a full trial. As indicated, I turn first to the question of the applicable law.

4. Applicable Law

4.1 Despite the international dimension which is a significant factor in these proceedings, no issue was, as I have pointed out, taken by any of the parties with this court's jurisdiction to hear and determine the matters of fact and of law now in dispute. However, as also noted, the argument urged on the court was that before turning to the application of the jurisprudence which flows from *Campus Oil v Minister for Industry and Energy (No. 2)* [1983] 2 I.R. 88 and the cases which followed it, the question of the relevant law must be considered and a ruling made as it is, as described by counsel, a "threshold issue".

4.2 Centralis argues that the terms of one or both of the Rome Regulations (namely Rome I and Rome II) apply to the respective situations and, therefore, to the law applicable to the cases against some or all of the defendants. It is unnecessary to set out in any great detail the precise arguments advanced under those regulations save to the extent that Rome I is said to be relevant to the law applicable to the employment contracts between AIB and the personal defendants whereas Rome II is said to be relevant to the law applicable to what is described as a restriction of competition issue between AIB and Centralis.

4.3 In their written submissions, and indeed in their initial oral argument, AIB did not address the question of the applicable law to the present proceedings and instead advanced its claim on the implicit basis that Irish law governed the substance of the dispute. It is said to be fatal to AIB's claim for an interlocutory injunction that it has not addressed this issue by seeking to provide the court with sufficient justification to ground the contention that Irish law is applicable to the proceedings or evidence as to the law of any other relevant jurisdiction. After this matter was canvassed by Centralis, AIB asserted that, far from being a preliminary matter, the issue of the applicable law is a question to be considered within the rubric of the Campus Oil jurisprudence and in particular with reference to the issue of whether there is a serious question to be tried. It was also contended that, in any event, the employment contracts, by implied agreement, are governed by Irish law and the tort/*delict i*s so closely connected with that contractual dispute that Irish law is applicable. In addition, it was argued that, independent of that close connection, the location of the damage suffered was sufficient to make Irish law applicable to the latter claim.

4.4 Centralis suggests that the first question to be tried is the threshold issue to which reference has been made. This would, it seems to me, amount to a departure from the ordinary rules of procedure which apply to the hearing and determination of interlocutory applications.

4.5 Where parties submit to the jurisdiction of a court they submit to its domestic rules of procedure, though not necessarily the substantive laws of that jurisdiction. In her judgment in *Salinas de Gortiari v. Smit*hwick [1999] 4 I.R. 223, at 231, Denham J. made the following findings which provide authority for this proposition:-

> "The general principle in conflict of laws is that procedure is governed by the *lex fori. Lex fori* is a technical term meaning the domestic law of the forum. In this case the law of the forum is Irish. Dicey and Morris, *The Conflict of Laws*, 12th ed. at p. 169, set out the rule as to matters of procedure:-
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> 'Rule 17 - All matters of procedure are governed by the domestic law of the country to which the court wherein any legal proceedings are taken belongs (*lex fori*).'
>
> Dicey and Morris state further that 'the principle that procedure is governed by the *lex fori* is of general application and universally admitted'. Applying this principle the court uses its own rules of procedure and refuses to apply any foreign rule which it determines is procedural. Thus, applying this rule to this case, if the issue is procedural it is governed by the law of the forum."

4.6 In his judgment in the same case, Keane J. repeating the rule as to matters of procedure expanded on this principle by outlining the rationale behind its application. His comments at 239 which follow are therefore of particular note:

> "As to the submission by counsel for the notice parties that this is in any event a matter of procedure, rather than of substance, which is governed by the lex fori, the law is thus stated by the learned editors of Dicey and Morris on the Conflict of Laws, in the passage at p. 169 to which he referred us:-
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> 'Rule 17 - All matters of procedure are governed by the domestic law of the country to which the court wherein any legal proceedings are taken belongs (lex fori).'
>
> The passage concludes with the following comment:-
>
> 'The primary object of this rule is to obviate the inconvenience of conducting the trial of a case containing foreign elements in a manner with which the court is unfamiliar. If, therefore, it is possible to apply a foreign rule, or to refrain from applying an English rule, without causing any such inconvenience, those rules should not necessarily, for the purpose of this Rule, be classified as procedural.'
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> To the same effect is the following comment by Professor William Binchy in Irish Conflicts of Law at p. 625:-
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> 'The rule that matters of procedure should be governed by the lex fori is based on considerations of practical necessity. Our judicial administration would descend into chaos if, in a case with a foreign element, the rules of evidence, of pleadings and of execution to be applied were those of a foreign country.'"

4.7 Insofar as it goes, there is no dispute but that the principle of *lex fori* applies in this case. Had the defendants, or any of them, wanted to dispute the application of the Irish rules of procedure then it would have been incumbent on them to challenge the jurisdiction of the court to consider the substantive dispute in the first place. Given that appearances were entered and no preliminary objection made as to forum it is not now open to the defendants to make that claim.

4.8 Were the boundaries of *lex fori* and *lex causae* clearly delineated the matter would end there, however this case is not so simple. The type of order sought by AIB is for a springboard injunction, which may be granted to cancel out the head start gained from certain forms of wrongdoing, in particular where such advantage necessarily lasts for a limited period of time. As pointed out earlier,

by its nature the granting of a springboard injunction, however limited in duration, can result in what can be, in effect, something close to a substantive determination of the issues between the parties. There is no way for the court to replace a lost legitimate head start which is removed by an interlocutory order. The only recompense can be monetary, which itself may be unsatisfactory for a variety of reasons.

4.9 Order 50 of the Rules of the Superior Courts 1986 sets out the rules of procedure regarding Interlocutory Orders; with rules 6 & 12 of particular relevance here. The circumstances in which such orders are made is determined, however, on the basis of the jurisprudence of the courts. This is, therefore, an example of a situation where the rules of procedure and substance coalesce to some extent.

4.10 How is the court to deal with situations where the exercise of a procedural rule, although intended to be without prejudice to the question of the applicable law, nevertheless effectively leads to a situation which may come close, in practice, to a substantive determination of the dispute between the parties?

4.11 Returning, for a moment, to the question of whether the applicable law in this case is a threshold issue or simply a matter to be weighed in the balance when assessing whether the applicant has demonstrated that there is a fair issue to be tried, my view at this stage is that the latter approach is to be preferred. The very nature of the interlocutory application, which offers an aggrieved party a procedural mechanism to secure certain forms of temporary relief, would be undermined if it were open to a party to raise substantive arguments at that stage and therefore convert, at least in part, the interlocutory proceedings into substantive proceedings. To borrow the phrase adopted by Keane J. "judicial administration would descend into chaos" if the procedural nature of a set of proceedings could be unilaterally changed by a party, without notice, merely by the raising of a particular argument.

4.12 As noted earlier there has been some suggestion that the courts may require a higher level of assurance that a plaintiff is likely to succeed before granting an interlocutory order which may have the effect of going a long way to deciding the case. That is an issue to which it will be necessary to return. However, irrespective of the level of assurance that the court must have as to the strength of the plaintiff's case, it seems to me that to depart from the general rule that all aspects of the merits of the case (including any relevant questions of law) are to be considered on either an arguable case or a strong case basis at an interlocutory stage (and not ultimately determined at that stage) would be a course of action which is not justified. It is clear that, at least in some cases, a detailed consideration as to what is the applicable law under either Rome I or Rome II can require the court to analyse the facts (and, indeed, reach conclusions on disputed facts). There will undoubtedly be cases where a decision as to the applicable law will be much more easily made when the court has had the benefit of full evidence and argument at trial. I will turn, briefly, to the reason why it is important for a court not to engage in a detailed examination of the full merits of the case in due course.

4.13 In those circumstances it seems to me that it would be inappropriate, unless compelled by the terms of applicable European or national law, to embark on a final decision as to the applicable law until the trial. I find nothing in Rome I or Rome II (or in any domestic measures) which require that a decision on applicable law must be made at the very beginning of the case.

4.14 The situation is, of course, entirely different where the jurisdiction of the court is challenged, placing reliance on the mandatory provisions of the Brussels I Regulation. In those circumstances it does not seem to me that I should determine the question of applicable law in a definitive way at this stage. Rather, that question is one which needs to be assessed as part of the overall consideration of whether a plaintiff has met the necessary standard for a fair issue to be tried, or in circumstances where the court has to apply a higher standard, a strong case.

4.15 The applicable law needs to be separately considered in respect of the personal defendants on the one hand and Centralis on the other hand. The personal defendants are, of course, bound in contract to AIB. It would seem that there are two relevant contractual documents so far as applicable law is concerned. Each personal defendant has a contract of employment. In addition, where each personal defendant was assigned to work in a foreign jurisdiction a further document is signed. While the text of that further document is not identical in each case, each relevant document contains a clause in the following terms:-

> "While in [], you will be subject to the laws of that country, including those laws relating to personal taxation. Any provisions of the Laws of [] which relate to employment there, which are not contained in this letter, shall be deemed to be contained and shall be binding on you and AIB now and into the future."

4.16 There can be little doubt that such a clause requires the employee concerned to comply with all relevant local laws while so assigned. However, it does not, it seems to me, necessarily follow that the entire contractual relationship between AIB and the employee concerned then becomes governed by the law of the relevant jurisdiction. It is, at a minimum, arguable that clauses of that type are simply desirable as an add on to the obligations which the relevant employee undertakes and which require the employee to do no more than comply with the old maxim of "when in Rome do as the Romans do". In other words, there is no reason in principle why an employee may not have a contract of employment which is governed by Irish law but where, as a term of that contract, the employee is required to obey any relevant laws and regulations of a country to which that employee might be assigned. There is, in my view, at least a strong arguable case on the part of AIB that the applicable law in respect of the personal defendants remains Irish law notwithstanding their assignment to another jurisdiction.

4.17 The position in respect of Centralis is, of course, different. Centralis has no contract with AIB. The position of the applicable law in respect of Centralis is, therefore, governed by Rome II. Centralis argues that the claim brought by AIB clearly falls within Article 6 concerning unfair competition and acts restricting free competition which is in the following terms:

> "1. The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.
>
> 2. Where an act of unfair competition affects exclusively the interests of a specific competitor, Article 4 shall apply.
>
> 3. (a) The law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected.
>
> (b) When the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may instead choose to base his or her claim on the law of the court seised, provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises; where the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, he or she can only choose to base his or her claim on the law of that court if the restriction of competition on which the claim

against each of these defendants relies directly and substantially affects also the market in the Member State of that court.

4. The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14."

4.18 However, AIB argues that the true nature of its case is not one where it seeks to prevent unfair competition as such but rather one where it seeks to protect its property rights (both intellectual property and goodwill) from being wrongfully used by a third party (viz. Centralis) who has found itself in a position to exploit those rights in circumstances where it is said that the ability of Centralis to exploit those rights stems from illegality on the part of the personal defendants. It seems to me that there is a strong arguable case for AIB's position under this heading. If, therefore, at trial, it is determined that the argument of AIB is correct then it follows that Article 6 would have no application.

4.19 In those circumstances AIB argues that the damage ultimately suffered as a result of the actions in tort by Centralis occurred in Ireland and therefore, under the Rome II Regulation, Irish law should govern the proceedings. This argument is made in the alternative where it is also argued that given the close connection between the disputes against Centralis and the personal defendants, in circumstances where the court was satisfied that the employment relationships are to be governed by Irish law, it would be incumbent on the court to hear the cases against the landscape of a single legal system. In this regard the court's judgment in *ICDL GCC Foundation FZ-LLC & Anor v European Computer Driving Licence Foundation* Ltd [2011] IEHC 343 was opened in support of the proposition that although involving different parties and involved contractual and tortious claims respectively, on the basis of a manifestly closer connection the court may opt to consolidate proceedings into one case which is heard under one applicable law.

4.20 On the basis of the evidence before me, and in light of the submissions of the parties, I am satisfied that AIB have made out a strong arguable case that the applicable law in this case is Irish law.

4.21 Having dealt with the applicable law questions which arose it is next appropriate to make some general observations about the grant of interlocutory injunctions.

5. The Grant of Interlocutory Injunctions

5.1 The criteria for the grant of interlocutory injunctions has been well settled in this jurisdiction since the decision of the Supreme Court in Campus Oil. In *Shelbourne Hotel Ltd. v Torriam Hotel Operating Co. Ltd*. [2010] 2 I.R. 52 Kelly J. noted a number of authorities from the United Kingdom which suggested an approach based on assessing where the least risk of injustice lay. Kelly J. did not find it necessary to reach any definitive conclusions on the point. As it happens, at much the same time, writing extra judicially in the foreword to Kirwan – *Injunctions Law and Practice* (1st Ed. 2008), I noted the same developments and suggested that a high value might be placed on an assessment of where the greatest risk of injustice might lie in future applications for interlocutory injunctions. As such, it is important to emphasise a number of points.

5.2 First, the *Campus Oil* jurisprudence is now so well established in the case law of the Supreme Court and, indeed, this Court, that it would, in my view, be impermissible for this Court to depart from it unless and until any judgment of the Supreme Court so authorised. However, on analysis, it seems to me that it is, perhaps, more appropriate to characterise the "greatest risk of injustice" criteria not so much as a different test to that which has become established in the *Campus Oil* jurisprudence but rather as the underlying principle which informs the more detailed rules which have been worked out in accordance with that jurisprudence.

5.3 It is inevitable that a court having to decide whether to grant or refuse an interlocutory injunction will be faced with some risk of injustice. The whole point of interim or interlocutory injunctions is that they are designed to be granted or refused after a very early and often quite brief hearing with a view to deciding what state of play should subsist until the court has an opportunity to conduct a full hearing. Against that background it is inevitable that there will be cases where an injunction will be granted but where it will turn out, after trial, and with the benefit of full evidence and argument, that the plaintiff who obtained the interlocutory injunction was in the wrong and should, with the benefit of hindsight, never have had the advantage of a restraining order. Likewise, it may transpire that a plaintiff who is refused an interlocutory injunction may succeed at trial and will have suffered whatever injustice flows from not having had the benefit of a court order in the intervening period.

5.4 Obviously, the extent to which there may be a risk of injustice can vary hugely from case to case and, within one case, from party to party. However, it seems to me that it is an acknowledgment by the court of that risk of injustice that informs the detailed rules that have evolved by reference to which the court decides whether to grant or refuse an interlocutory injunction. If a plaintiff cannot establish a fair issue to be tried, then there is obviously a huge risk of injustice in imposing an injunction on a defendant where there is, at least at the time of the interlocutory hearing, no real basis for supposing that the plaintiff will ultimately succeed.

5.5 Likewise, the adequacy of damages (whether it be damages that the defendant might be asked to pay or damages which the plaintiff might be required to meet on his undertaking as to damages) is a consideration which is very closely connected with the risk of injustice. If damages are truly an adequate remedy for a plaintiff then, if the plaintiff succeeds, the appropriate amount of damages will be awarded and the plaintiff will be adequately compensated. The only injustice will be that the plaintiff is deprived of his money in the intervening period but that can, ordinarily, be dealt with by an award of interest or the like.

5.6 Similarly, if a defendant can be adequately compensated for the effects of being subjected to an interlocutory injunction by damages awarded on foot of the plaintiff's undertaking as to damages, the risk of injustice is similarly small.

5.7 Finally, the balance of convenience is, perhaps, the factor that is most closely and directly associated with the risk of injustice. Where both plaintiff and defendant have established arguable cases for respectively the claim and the defence and where neither could be adequately compensated in damages, the court turns to the balance of convenience. In substance, the court has to assess how serious the consequences for the respective parties would be in the event that an injunction is granted which ultimately, again with the benefit of hindsight after a trial, should not have been granted or is refused where ultimately, with the benefit of hindsight after a trial, it is determined that it should have been granted. In both cases the parties will, on the hypothesis that leads to a consideration of the balance of convenience, be at risk of suffering consequences for which damages would not be an adequate remedy. There will, therefore, either way, be irremediable consequences of either the granting or refusal of the interlocutory order sought. The court has to form a view as to which of those consequences, on balance, would be the lesser.

5.8 On the basis of that analysis, it might be said that giving consideration to the least risk of injustice does not really add much to the overall picture for it might be seen simply to justify the existing set of rules. However, it seems to me that a "least risk of injustice" analysis has perhaps some additional benefits. First, it can be a useful measure for deciding whether a somewhat different approach to normal is needed in particular types of cases. It is now well settled that in cases involving a mandatory injunction the

court will normally require a higher level of likelihood that the plaintiff has a good case before granting an interlocutory injunction (see for example *Lingam v Health Service Executive* (Unrep., Supreme Court, Fennelly J. 4th October, 2005). It may well be that the logic behind that departure from the normal rule can be found in the added risk of injustice that may arise where the court is asked not just to keep things as they were by means of a prohibitory injunction but to require someone to actively take a step which may, with the benefit of hindsight after a trial, turn out not to have been justified. The risk of injustice in the court taking such a step is obviously higher. In order to minimise the overall risk of injustice the court requires a higher level of likelihood about the strength of the plaintiff's case before being prepared to make such an order. Likewise, in cases such as *Evans v IRFB Services (Ireland) Ltd* [2005] IEHC 107 and *Bergin v Galway Clinic Doughiska Ltd* [2008] 2 I.R. 205 the attempt to fashion an interlocutory order which minimised the overall risk of adverse consequences might be seen to be examples of the same underlying principle.

5.9 Given that, based on the above analysis, the detailed rules which have evolved for considering interlocutory injunction applications can be said to stem from an attempt by the court to work out the course of action which gives rise to the least risk of injustice, then it may well be that that underlying principle can be a useful tool or measure to be applied where the court is confronted with a difficult situation. Given that, for reasons which I have already touched on, the springboard injunction is unusual in a number of respects, it seems to me that it is appropriate to have regard to the underlying principle of attempting to fashion a result to an interlocutory application which gives rise to the least risk of injustice, in approaching the application of the general rules to the special and unusual circumstances of a springboard injunction. I will shortly turn to the jurisprudence in respect of springboard injunctions. It seems to me that that jurisprudence needs to be considered and analysed in the context of the underlying principle that the court must seek out a course of action which gives rise to the least risk of injustice.

5.10 However, before departing from this general topic I might add one further observation. All of the authorities make it clear that the court should not attempt, in reaching whatever assessment is necessary to decide on an application for an interlocutory injunction, to resolve contested issues of fact. It might, on a superficial view, be thought that that rule is a departure from the underlying principle of attempting to minimise the risk of injustice to which I have referred. Might not finding against, at an interlocutory hearing, a party who seems likely to win at trial, give rise to a highlighted risk of injustice? However, it seems to me that on detailed analysis a different picture emerges.

5.11 The whole point of the interlocutory injunction procedure is to enable the court, in appropriate cases, to make some sort of immediate order in a much shorter timeframe than that within which a full trial of all issues between the parties could realistically hope to take place. The interlocutory injunction jurisdiction is a recognition that, at least in some cases, irremediable adverse consequences can happen pending trial which, in appropriate cases, the court should act to prevent. However, by definition the process requires a very early hearing of the interlocutory application. That gives rise to practical difficulties. If the court were to attempt to form a judgment as to the strength or weakness of each side's case as part of the process of assessing whether an interlocutory injunction should be granted or not, then there would be inevitable logistical consequences of such a course of action.

5.12 First, so far as the facts are concerned, it would be very difficult to resist an application on the part of either party to put in successive tranches of new evidence. Under the current test, and once both parties have put sufficient evidence before the court to allow the court to conclude that each has a case on the facts, nothing is gained by the filing of further evidence as to the merits of the proceedings. The only question is as to whether there is a fair issue to be tried. Once that stage is reached (having regard to the filing of evidence on both sides), then nothing, in truth, can be gained by further replying and cross replying affidavits although it does have to be said that parties are sometimes reluctant to leave matters stand. The courts, however, quite properly, are reluctant to allow the process to be lengthened by the filing of additional affidavit evidence when that evidence does no more than provide further argument in favour of a proposition which might already have sufficient evidence in its favour to meet the fair issue to be tried test. A court can, under the current test, legitimately inquire of a party as to whether it really needs any more evidence. On the other hand, if the court were to take into account the weight of the evidence on either side, it would be difficult to resist an application by either party to put in further evidence for the case could be made that, while there was already a fair issue to be tried on the evidence as it stood, the additional evidence sought to be furnished in reply might strengthen the relevant side's case and, thus, be a factor in the overall determination of the court.

5.13 The consequences of such a course of action are obvious. Parties would be reluctant to leave any affidavit unanswered. The process of filing additional affidavit evidence would be significantly elongated. The likely time which the case would take at hearing at the interlocutory stage would be significantly lengthened. The longer the trial of the interlocutory issue is likely to take, the more delay may be incurred in finding a suitably lengthy slot in the court's list to enable the hearing to take place and, all in all, the whole point of an early hearing on the question of what the situation should be pending trial would be defeated.

5.14 While there might, therefore, be a superficial attraction in suggesting that the court should have regard to the weight of the case on either side on the basis that making a decision at an interlocutory stage in favour of a party which had a very weak case (be they plaintiff or defendant) increased the risk of injustice, the counter argument seems to me to be much more weighty. That counter argument is that exposing the interlocutory hearing to the significant additional evidence that would need to be filed on all sides if the court had to assess the weight of the case on either side and exposing the argument to the much more detailed legal submissions on the merits of the case which would also be required (at least if there be complex legal issues involved) in those circumstances, would lead to such a delay in the hearing of the interlocutory injunction as would, at least in many cases, defeat the whole purpose of the interlocutory jurisdiction.

5.15 Indeed, it would, in many cases, give rise to a further layer of difficulty where the court would be called upon to decide what was to be in place pending the hearing of the interlocutory injunction. Already that can sometimes be a problem. A plaintiff who does not seek (or who is not given) an interim injunction is often faced with an application for an adjournment by the defendant when the interlocutory injunction is first listed. The defendant (particularly if there has been short service) will often point to the difficulty in having affidavits sworn and legal arguments prepared in time. If the adjournment sought is relatively brief, then it may be possible to deal with the question of what the situation is to be pending the adjourned date in a relatively straightforward way. However, if there is likely to be a long gap between the time when the interlocutory application first comes before the court and when it is ultimately determined, then it is obvious that much greater difficulty may be faced by the court in having to consider what is to happen not until there is a trial of the action but until there is a trial of the interlocutory application. Similar considerations apply to a defendant who is faced with an interim injunction already in being and who will often be invited to agree to a continuation of that interim injunction pending the hearing of an interlocutory application in circumstances where that defendant needs more time to put in its evidence and marshal its legal arguments. Again, if the gap is anticipated as being short, no great problem may emerge. However, if there is likely to be a long gap then the court will, doubtless, be faced with having to engage in some kind of a hearing to decide what the situation should be pending the determination of the interlocutory application. All of that is a recipe for procedural chaos, an additional waste of valuable court time, and, indeed, a significant potential injustice in individual cases. The superficial argument that the least risk of injustice might be ascertained by at least having some regard to the weight of the case is, in my view, not correct. That does not mean that there may not be particular categories of cases, such as the mandatory injunction jurisdiction to which I have already

referred, where the court may not require a higher level of likelihood of a plaintiff succeeding before being prepared to take the risk of injustice inherent in particular types of orders. However, even in such cases there is a significant potential downside in requiring a detailed assessment of disputed facts as part of any attempt to determine the weight of the respective cases.

5.16 I have already noted the issue which arises as to whether, given that what is sought in these proceedings is a springboard injunction, there may be a case to be made that the court requires a higher level of assurance that the plaintiff will succeed by reason of the fact that the granting of an interlocutory injunction in favour of AIB might well amount to a resolution of all of the issues (with the exception of damages) in this case in AIB's favour. As noted earlier, there is an argument to be made to the effect that the court should require a higher level of likelihood that the proceedings will succeed in those circumstances. I have come to the view that there is an obligation on a plaintiff, seeking to obtain an interlocutory springboard injunction, to satisfy the court of a strong arguable case for those reasons.

5.17 However, in the light of the analysis which I have just conducted, it does not seem to me that it is appropriate for the court to enter into a detailed analysis of controversial facts in reaching any assessment as to the likelihood of the plaintiff's claim ultimately succeeding in the context of applying the appropriate tests at an interlocutory stage. The court can, of course, conclude that, even on the facts asserted by the plaintiff, the case would be weak and might fail to reach the strong case test where that test applies. The court can also, for reasons such as clear internal inconsistency in the evidence presented, come to the view that the facts asserted as forming the basis of the issue to be tried lack any credibility. So far as the factual element of the plaintiff's case is concerned the court should assess whether, on the basis of the asserted facts for which credible evidence is presented, the plaintiff has a strong arguable case.

5.18 The court should, in my view, however, refrain from attempting to engage in the sort of detailed analysis that would be necessary to form a view as to the likely chances of success or failure on controversial facts for, amongst other reasons, to so do would run the risk of the procedural chaos to which I have referred.

5.19 With those observations in mind, I now turn to the question of whether AIB has produced such evidence.

6. AIB's Case on the Facts

6.1 In order to briefly set out the evidence relevant to the question of whether AIB has established a strong arguable case (having regard to the observations made in the last section of this judgment), it is of some relevance to summarise the sequence of events. On the evidence currently available it would appear that senior personnel within AIB Capital Markets heard rumours or suggestions that staff within AIB IFS were preparing to depart and were taking steps to facilitate the movement of business with them. On foot of those rumours it appears that an investigation was carried out with the benefit of IT specialists. A significant volume of materials, such as emails and attachments, were produced as a result of that investigation. Interviews with key personnel (whether those personnel were suspected of being involved in the proposed move or not) were conducted and detailed minutes kept.

6.2 Most of the materials placed before the court, on which AIB relies for its contention concerning the facts, derived from that investigation. I will refer briefly to an overview of that evidence in due course. However, some additional facts which provide the backdrop to that information do need to be noted.

6.3 First, there is the question of bonuses. It is clear that there was significant contention between AIB and personnel within AIB IFS on the bonus issue going back for some period of time. The backdrop to AIB's position was, of course, the public controversy (and consequential government action) on the payment of bonuses to bankers. On the other hand, personnel within AIB IFS appear to have held the view that their part of the banking operation was profitable and that any bonuses which might have been paid to them would have been in accordance with industry standard and would have been of the same order as were likely to be paid to others working in a similarly profitable section of a bank which was not under government control or subject to the same type of public controversy. It was suggested that if, for example, any senior employee were to work for a non-Irish bank in the IFSC their pay and conditions would have entitled them to the payment of relevant bonuses. In those circumstances there would appear, again on the evidence currently available, to have been a concern on the part of senior managers within AIB IFS that it would be impossible to retain many senior employees in the event that bonuses were not paid for those employees could, it was said, easily move to other employers who could and would pay bonuses.

6.4 In that context, it is also important to say a little more about the nature of the business carried on by AIB IFS. Many multinational companies establish subsidiaries in various countries for a range of reasons (including a minimisation of their exposure to taxation). In many cases, it is important that the subsidiary concerned actually conduct much of its activities in the country in question. However, in some cases such companies in effect contract in the necessary work from a company such as AIB IFS who provide personnel, at the office in question, to carry out appropriate activities on behalf of the company. It also appears that companies providing services such as AIB IFS may provide office facilities and equipment. Thus, it appears, at the offices maintained by, for example, any one of the individual operating companies, a variety of multinational entities would base their subsidiary or subsidiaries in the country concerned (for example, Switzerland) at offices provided by AIB IFS and the personnel who carried out the functions of the relevant subsidiary at those offices would be personnel (including directors) supplied by AIB IFS on an agreed basis.

6.5 Thus, the senior personnel within AIB IFS and its operating subsidiaries had a very close link to the customers of AIB IFS. That involvement in some cases went so far as serving as directors on the boards of relevant subsidiaries of AIB IFS's multinational customers. In those circumstances, it seems at least arguable that the retention of most senior personnel was even more vital to a company which carried on a business such as that of AIB IFS than it would be to other companies with different types of business. In passing it is worthy of some note that if that analysis (which was clearly the view held at the time by senior personnel within AIB IFS) is correct, then the value of AIB IFS had the potential to be significantly affected by the departure of senior personnel. If it be correct that there was a serious risk that there would be large scale departure deriving from the bonus issue, then the somewhat paradoxical situation would have arisen whereby the sale price to be achieved for AIB IFS (which, given that AIB is almost entirely owned by the taxpayer, would be, in substance, a sale price for the benefit of the taxpayer) had at least the potential to be significantly reduced by the failure to pay bonuses (which failure seems largely to have been driven by demands from those self same taxpayers). On the other hand it should be pointed out that AIB, while acknowledging that the bonus issue was a significant matter of contention at the relevant time, draws attention to the fact that, once AIB IFS was sold by AIB Capital Markets, the new purchaser would be free to pay whatever bonuses were considered appropriate. On that basis it is suggested that the bonus issue was not quite as serious as might otherwise appear. Be that as it may, it is clear on all the evidence that there was significant agitation within AIB IFS at the relevant time on the bonus issue.

6.6 The second background fact concerns the MBO. The reason why the MBO is of some relevance is that it is obvious that those senior personnel who were involved in the potential MBO were legitimately involved in exercises at the relevant time concerning an assessment of the value of the company. Obviously, any management which is considering buying out the company which they

manage will have to conduct the same kind of assessment of the value of the company as any third party bidder would. Management will, of course, start with a much clearer picture of the company than unconnected third parties and may, therefore, need less information. At the same time, it would be surprising if management involved in a potential buy out were not involved in conducting exercises designed to attempt to value the company, not least because any management buy out will necessarily require funding thus involving lenders in having to assess the viability of the relevant proposal. One of the factual issues which appear to arise between the parties stems from the proper interpretation of some documents which were undoubtedly produced by the personal defendants at material times. On the defendants' case, those documents were part of a legitimate exercise in valuing the company for the purposes of the MBO. On AIB's case, the documents involved relevant personnel in carrying out an assessment of business that might be expected to be capable of being moved to Centralis in the event that the MBO was unsuccessful and some or all of the relevant personnel decided to go to Centralis.

6.7 As pointed out earlier, it is no part of my function at this stage to reach any conclusions on contested questions of fact. Having reviewed all of the affidavit evidence, it seems to me that AIB has put before the court sufficient credible evidence which, if accepted at trial, would provide a strong arguable basis to the effect that an inference can be drawn from that evidence to the effect that the personal defendants were engaged, prior to the termination of their contracts of employment, in at least some activities which were designed to facilitate the transfer of AIB IFS business to Centralis. While those facts are contested, it cannot be said that AIB's assertions lack the sort of credibility which would affect a conclusion that a strong arguable case test had been meet.

6.8 In particular, there is evidence for the following allegations made by AIB. First, there is evidence of approaches being made to customers of AIB IFS, while the relevant contracts of employment remained in place, to ascertain whether those customers might be prepared to move. While the personal defendants contest those facts there is, in my view, sufficient evidence which, if accepted at trial, could lead the trial judge to concluding in favour of AIB on this point. It is both inappropriate and impossible to reach any view on the likelihood of either side succeeding on the dispute arising out of those contested facts.

6.9 Second, there is evidence of a significant download of customer information prior to the termination of the contracts of employment of the individual defendants. A little more detail is required under that heading. In the course of supplying the services for subsidiaries of multinational companies to which I have referred it is, of course, inevitable that a significant amount of soft copy documentation will be produced. In order to maintain the documentation in the hands of the relevant subsidiary it was the case that, in at least some instances, dedicated laptops were kept at the offices in question for the purposes of maintaining documents relevant to the relevant subsidiary. It would appear that sometime around the 12th and 13th July in the offices at 16 Avenue du Pasteur a significant download of information from the AIB IFS server regarding 17 clients onto USB sticks occurred. The explanation given by the relevant personal defendants is that the purpose of that download was entirely legitimate and designed to facilitate materials, which had been kept on the general AIB IFS server, being transferred to individual laptops associated with the different company clients. There could be nothing, of course, wrong in itself with documents which were the property of a relevant subsidiary of a multinational company being placed on a laptop associated with that company. However, AIB asserts that at least some of the information downloaded does not appear to have been placed onto relevant laptops and, perhaps equally importantly, that the underlying purpose behind the download was to ensure that each customer had all of its relevant information on a laptop so as to facilitate the customer in question in moving its business from AIB IFS to Centralis. There are significant issues of dispute between the parties as to whether it is appropriate to draw any adverse inference against the personal defendants under this heading. I am satisfied that AIB has put forward credible evidence which, if accepted at the trial, would provide a strong arguable basis for an inference that the download in question was designed not for bona fide purposes but rather to facilitate a business transfer. Again, no view on the likelihood of success of either party on this issue is appropriate.

6.10 Third, there is evidence that documents were prepared setting out in some detail the status of each customer within relevant sections of AIB IFS's business. In that regard, a number of points are made on behalf of the personal defendants. First, it is said that those documents were prepared in the context of the MBO and were, therefore, legitimate. Second, it is said that the information contained in those documents was not, in truth, of a highly confidential nature. Part of the case made under this heading is that the fact that AIB IFS or one of the operating companies provides services to any particular company, can easily be ascertained from publicly available sources, not least because the nameplate of the company concerned will appear at the relevant offices maintained by AIB IFS or one of the operating companies. Insofar as the relevant documents contain information about the length of notice or periodic renewal applicable to the contracts of the relevant customers is concerned, it is said that those periods were industry standard and something which anyone within the business would know in any event. Under this heading again I am satisfied that AIB has put forward credible evidence which, if accepted at trial, would provide a strong arguable case that the motivation behind the production and dissemination of the documents in question was not designed with a view to the MBO and, at least so far as some of the materials concerned, goes beyond information that would easily and readily have been capable of being assembled by a diligent third party. Yet again, no view is appropriate on the likely outcome of the trial on this controversy.

6.11 Having taken those factors in particular, but also all other matters canvassed in the evidence into account, I am satisfied that there is, with a degree of assurance appropriate to this case, a strong arguable case to the effect that not only was a plan put in place to move personnel and business to Centralis but also that actions were taken in furtherance of that plan which amounted to a breach of contract on the part of at least some personnel involved, and which also amounted to the taking of confidential information in furtherance of that plan.

6.12 That analysis leads to the conclusion that AIB has established a strong arguable case to the effect that at least some personnel were involved in a plan in respect of Centralis where the execution of that plan involved a breach of contract by taking steps in furtherance of that plan while the relevant personnel were still contracted to AIB entities.

6.13 However, it needs to be recalled that the position, at least to some extent, of the individual defendants was differently argued. As pointed out earlier, the case insofar as Mr. Diamond and Mr. O'Shea was concerned did not proceed in that AIB did not seek an interlocutory injunction in those cases for the reasons already set out. Of the remaining personal defendants, Mr. Walsh was separately represented and made the case that the evidence as against him did not bear any adverse inference. In that context, it is necessary to turn to the case against the individual defendants.

7. The Case against the Individual Defendants

7.1 As pointed out to date, I have been concerned with those aspects of the facts in respect of which I am satisfied AIB has made out a strong arguable case as to the situation generally. The next question which needs to be addressed is as to whether that general finding is applicable in the case of each of the personal defendants. In that context, it is appropriate to refer to the submission made in reply by counsel for AIB. In substance the contention of counsel was that it is open to a court to draw an inference from the existence of a concerted plan and the involvement of anyone in that plan, of complicity by each individual so

involved in each element of the plan. It seems to me that it can, in certain cases, be appropriate for a court to draw such an inference depending on the primary facts found.

7.2 The fact that a number of persons may be involved in a general overall scheme does not, of course, necessarily imply that each individual was involved in or approved of and authorised each individual element of the scheme or each action carried out in furtherance of the scheme. Scrutiny under this heading is particularly important where it is the means by which the scheme was to be implemented rather than the scheme itself which may be unlawful. As pointed out earlier, none of the relevant contracts of employment contained a non-complete clause. It is clear, therefore, that there was nothing to prevent any employee of AIB IFS from giving appropriate notice in accordance with the terms of their contract of employment, commencing employment immediately thereafter with Centralis and, when employed by Centralis, seeking by any lawful means to persuade clients of AIB IFS to transfer their business to Centralis. The fact that the employees might, by securing that a sufficient portion of AIB IFS's business might transfer to Centralis, come to own a significant shareholding in Centralis does not alter that fact. The overall scheme is not, therefore, in itself in any way unlawful.

7.3 The scheme may only be unlawful in its implementation if impermissible steps were taken by employees, while still employed by AIB, to further the scheme. In that context it is important to refer briefly to the jurisprudence concerning the extent to which an employee, while still employed by an existing employer, can put in place plans for what is to happen in competition with his current employer after that employment leaves.

7.4 In *Regal (Hastings) Ltd. v Gulliver* [1967] 2 AC 134, at 144, Lord Russell of Killowen made the following statement of law, which is a useful starting point in this case:

> "The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account."

7.5 This was later followed in *Industrial Development Consultants Ltd v Cooley* [1972] 2 All ER 162, at 176, where Roskill J. briefly noted that same principle that:

> "It is an overriding principle of equity that a man must not be allowed to put himself in a position in which his fiduciary duty and his interests conflict."

7.6 This leads to the question: what is a fiduciary? In *Bristol and West Building Society v Mothew* [1996] 4 All ER 698, at 711-712, Lord Justice Millett provided the following definition:

> "A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary."

7.7 It was this definition that formed the backdrop to the decision of Elias J. in *Nottingham University v Fishel* [2000] in which he considered the question of whether an employee may be held to be a fiduciary of his employer. The relevant part of his decision is in the following terms:

> "Trustees, company directors and liquidators classically fall into this category which Dr. Finn, in his seminal work on fiduciaries, has termed "fiduciary offices" (see PD Finn, Fiduciary Obligations (1977)). As he has pointed out, typically there are two characteristics of these relationships, apart from duty on the office holder to act in the interests of another. The first is that the powers are conferred by someone other than the beneficiaries in whose interests the fiduciary must act; and the second is that these fiduciaries have considerable autonomy over decision making and are not subject to the control of those beneficiaries.
>
> By contrast, the essence of the employment relationship is not typically fiduciary at all. Its purpose is not to place the employee in a position where he is obliged to pursue his employer's interests at the expense of his own. The relationship is a contractual one and the powers imposed on the employee are conferred by the employer himself. The employee's freedom of action is regulated by the contract, the scope of his powers is determined by the terms (express or implied) of the contract, and as a consequence the employer can exercise (or at least he can place himself in a position where he has the opportunity to exercise) considerable control over the employee's decision making powers. This is not to say that fiduciary duties cannot arise out of the employment relationship itself. But they arise not as a result of the mere fact that there is an employment relationship. Rather they result from the fact that within a particular contractual relationship there are specific contractual obligations which the employee has undertaken which have placed him in a situation where equity imposes these rigorous duties in addition to the contractual obligations. Where this occurs, the scope of the fiduciary obligations both arises out of, and is circumscribed by, the contractual terms; it is circumscribed because equity cannot alter the terms of the contract validly undertaken.
>
> […]
>
> The problem of identifying the scope of any fiduciary duties arising out of the relationship is particularly acute in the case of employees. This is because of the use of potentially ambiguous terminology in describing an employee's obligations, which use may prove a trap for the unwary. There are many cases which have recognised the existence of the employee's duty of good faith, or loyalty, or the mutual duty of trust and confidence – concepts which tend to shade into one another. As I have already indicated, Lord Millett has used precisely this language when describing the characteristic features which trigger fiduciary obligations. But he was not using the concepts in quite the same sense as they tend to be used in the employment field. Lord Millett was applying the concepts of loyalty and good faith to circumstances where a person undertakes to act solely in the interests of another. Unfortunately, these concepts are frequently used in the

employment context to describe situations where a party merely has to take into consideration the interests of another, but does not have to act in the interests of that other.

[…]

Accordingly, in analysing the employment cases in this field, care must be taken not automatically to equate the duties of good faith and loyalty, or trust and confidence, with fiduciary obligations.

[…]

Accordingly, in determining whether a fiduciary relationship arises in the context of an employment relationship, it is necessary to identify with care the particular duties undertaken by the employee, and to ask whether in all the circumstances he has placed himself in a position where he must act solely in the interests of his employer. It is only once those duties have been identified that it is possible to determine whether any fiduciary duty has been breached […]".

7.8 In the case of *Crowson Fabrics Ltd v Rider and others* [2007] EWHC 2942 (Ch), following on from the *Fishel* case, Smith J. held that:

"Where an employee is not a director it is essential to look at the role of that employee and determine whether or not the nature of that role is sufficiently senior for the court to conclude that in addition to his normal duties as an employee he owed fiduciary duties."

7.9 However, even if not a fiduciary an employee owes a duty of fidelity to an employer as part of the mutual relationship at the heart of a contract of employment. That duty of fidelity prevents an employee, while still employed, from taking actions in competition with the employer concerned. However an employee is entitled to take preparatory steps for life after the contract of employment has terminated. Smith J., in *Crowson Fabrics,* quoted the decision in *Helmut Integrated Systems Ltd v Tunnard* [2006] EWCA Civ 1735, [2007] IRLR 126 on the question of the legitimacy of preparatory activity:

"The battle between employer and former employee, who has entered into competition with his former employer, is often concerned with where the line is to be drawn between legitimate preparation for future competition and competitive activity undertaken before the employee has left. This case has proved no exception. But in deciding on which side of the line Mr Tunnard's activities fall, it is important not to be beguiled into thinking that the mere fact that activities are preparatory to future competition will conclude the issue in a former employee's favour. The authorities establish that no such clear line can be drawn between that which is legitimate and that which breaches an employee's obligations."

In his conclusion, Smith J. determined that the defendants were in breach of their duty of fidelity and that one of them was also in breach of his fiduciary duty in a number of ways, namely:

"First, they set about creating a rival business in breach of those duties. Second, they retained or copied or transferred to [NewCo] documents belonging to the Claimant with a view to using them as an illegitimate springboard to compete with the Claimant. Third, they solicited the business of agents and some customers. Fourth, they diverted some business opportunities to themselves."

Of note is that on the facts in *Crowson Facts*, the defendants, while working out their notice periods, had also incorporated a company, identified and acquired a substantial leasehold premises and purchased a computer and registered an email account for the planned business. However, these facts did not form part of the actions determined by the court to have been in breach of the defendants' duties to their employer.

7.10 In *Wessex Dairies Ltd v Smith* [1935] 2 KB 80, at 88, Maugham L.J. provided the following guidance as to where the line between legitimate preparation and a breach of an employee's duty to his employer lies:

"The Lord Justice then asked himself whether the defendant in Robb v. Green ([1895] 2 QB 1) acted with good faith and fidelity. The same question has to be answered in the present case. In dealing with it certain considerations should not be left out of sight. First, after the employment terminates, the servant may, in the absence of special stipulation, canvass the customers of the late employer, and further he may send a circular to every customer. On the other hand, it has been held that while the servant is in the employment of the master he is not justified in making a list of the master's customers, and he can be restrained, as he was in *Robb v. Green*, from making such a list, or if he has made one, he will be ordered to give it up. But it is to be noted that in *Robb v. Green* the defendant was not restrained from sending out circulars to customers whose names he could remember. Another thing to be borne in mind is that although the servant is not entitled to make use of information which he has obtained in confidence in his master's service he is entitled to make use of the knowledge and skill which he acquired while in that service, including knowledge and skill directly obtained from the master in teaching him his business. It follows, in my opinion, that the servant may, while in the employment of the master, be as agreeable, attentive and skilful as it is in his power to be to others with the ultimate view of obtaining the benefit of the customers' friendly feelings when he calls upon them if and when he sets up business for himself. That is, of course, where there is no valid restrictive clause preventing him doing so.

In this case the question is whether the defendant acted with fidelity when, on the Saturday afternoon in question and perhaps on the previous days of the week, in going his round he informed the customers that he would cease on Saturday to be in the employment of the plaintiffs, that he was going to set up business for himself, and would be in a position to supply them with milk. He was plainly soliciting their custom as from Saturday evening. In my opinion that was a deliberate (sic) as it was a successful canvassing at a time when the defendant was under an obligation to serve the plaintiffs with fidelity. I am of opinion therefore that he committed a breach of his implied contract by acting as he did before the termination of his employment."

7.11 Elaborating on that case, Lord Green MR, in *Hivac, LD. v Park Royal Scientific Instruments, LD.* [1946] 1 Ch. 169, at 177, noted:

"I cannot read the judgment as meaning that if the roundsman had on a Saturday afternoon, when his work was over, gone round to all these customers and canvassed them, he would have been doing something he was entitled to do. It would be a curious result if, quite apart from making use of the list of customers or his special knowledge or anything of that kind, he could set himself during his spare time deliberately to injure the goodwill of his master's business by trying to get his customers to leave him."

7.12 It was thereafter in following this decision that, in *Sanders v Parry* [1967] 1 WLR 753¸ Havers J. ruled that where an employee enters into an agreement with a customer to transfer that customer's business from his employer to the employee's own practice but did not inform his employer of the proposal: he breaches the implied term of good faith and fidelity in the employment agreement. This decision was reached notwithstanding that the agreement was initiated by the customer.

7.13 While AIB argues that the personal defendants are fiduciaries, as a fallback AIB relies on the proposition that, where an employee is not found to be a fiduciary the test is as to whether any actions on the part of a relevant employee went beyond the line identified in the above jurisprudence. Did the actions concerned amount to actual competition at a time when the relevant employee remained in the employ of the former employer and owed that employer a duty of fidelity or was it simply legitimate pre-planning and non-competitive preparatory steps which are permissible?

7.14 By reference to that standard, it seems to me that the factual matters, in respect of which I am satisfied that AIB has made out a strong arguable case, fall on the wrong side of that line from the perspective of the personal defendants. If it is established at trial that any of the personal defendants were involved in a scheme which involved taking steps in the form of securing confidential information, approaching existing clients, downloading information to facilitate the transfer of such clients and the like then same would clearly be unlawful. I have already concluded that AIB has made out a strong arguable case on the facts that such a scheme was in place. It will, of course, be for the trial judge to decide whether that case is fully made out on the balance of probabilities at the end of the day. So far as Mr. Foley, Mr. McEvoy and Mr. O'Reilly are concerned, I am satisfied that the evidence is sufficient to give rise to a strong arguable case that their level of involvement in the implementation of the scheme in that way was sufficient so as to give rise to an inference that they expressly or by implication approved of the implementation of the scheme in an unlawful manner. It should be recorded that each of the three individuals concerned denied their involvement in anything unlawful. It will be for the trial judge, who will have had the benefit of all of the evidence and will have the benefit of seeing relevant witnesses cross examined, to conclude whether, on the balance of probabilities, that case is made out. It is sufficient, for the purposes of this application, to conclude that there is a strong arguable case to be tried on the facts for the illegality contended for on the part of AIB in respect of those defendants.

7.15 The situation regarding Centralis is relatively straightforward in that it stands to gain from the actions complained of against those personal defendants referred to above and as such I am satisfied that a case has been made out that there exists a corresponding strong arguable case against Centralis also. It is on this basis, and in light of the analysis of Dunne J. in *Net Affinity Ltd v Conaghan & Ors* [2011] IEHC 160, to which it will be necessary to return later, that I am satisfied that it is appropriate to make an order against Centralis.

7.16 The case in respect of Mr. Walsh is more difficult. The extent to which there is evidence of an actual involvement on the part of Mr. Walsh is relatively limited. That Mr. Walsh had an involvement in the overall scheme is, perhaps, clear. However, for the reasons which I have pointed out, the scheme was capable of being implemented in a lawful manner provided that those involved did not "jump the gun". The mere fact of Mr. Walsh's involvement in the overall scheme would not, therefore, necessarily give rise to an inference that he was involved in or approved and authorised unlawful activity. The question which I must ask is as to whether there is sufficient evidence, at present, to warrant a conclusion that there is a fair case to be tried on the facts that Mr. Walsh was involved in or accepted and approved of an unlawful implementation of the scheme. On balance, I have come to the view that the evidence currently available does not go sufficiently far to enable me to conclude that AIB has made out a fair case in respect of Mr. Walsh. It may be that the evidence which will be available at the trial will put the matter further. However, I am confined to the evidence which is before me and am not satisfied that there is enough evidence to establish a sufficient case on the facts for the contention that Mr. Walsh was knowingly involved in and accepted and authorised any unlawful implementation of an overall scheme designed to improperly take customers from AIB IFS to Centralis. It follows that, on that ground alone, no injunction should be given against Mr. Walsh and that he should be released from the undertaking presently in place.

7.17 However, so far as the other remaining defendants are concerned it is necessary to go on to consider the adequacy of damages.

8. Adequacy of Damages

8.1 If it ultimately turns out to be established that the personal defendants put in place a scheme whereby they abused their position as employees of AIB IFS for the purposes of obtaining an unlawful advantage in attempting to secure that customers and employees of AIB IFS would transfer to Centralis and if no interlocutory injunction were granted, I am satisfied that AIB would suffer irreparable harm. In saying that, I agree with counsel for various of the defendants who emphasised that the harm in respect of which damages must be found to be an inadequate remedy must be harm which is going to occur in the future rather than harm which has already occurred. While much was made on behalf of AIB of the €22m diminution in the purchase price which AIB Capital Markets would appear to have ultimately achieved in respect of its sale of its interests in AIB IFS and the operating companies to Capita, any such loss appears to have occurred already. If, and to the extent that, any such loss can be attributed to wrongdoing on the part of any or all of the defendants, then of course AIB or AIB Capital Markets or any of the other plaintiffs as appropriate may be entitled to recover damages. However, any such loss has occurred and the grant or refusal of an injunction will not change that fact. The harm in respect of which the court needs to assess the adequacy of damages is harm which may be prevented by the granting of an interlocutory injunction. On that point I agree with counsel for the respective defendants.

8.2 However, it seems to me that another important factor is at play. If AIB is correct, then the actions of the defendants amount to a wrongful taking of AIB's property rights in its business, both as to its goodwill and as to confidential information concerning its customers. The courts have always been anxious to guard property rights in the context of interlocutory injunctions. See for example *Metro International SA v Independent News & Media plc* [2006 1 ILRM 414. The reason for that is clear. Even though there may be a sense in which it may be possible to measure the value of property lost, declining to enforce property rights on the basis that the party who has lost its property can be compensated in damages would amount to a form of implicit compulsory acquisition. If someone could take over my house and avoid an injunction on the basis that my house can readily be valued and he is in a position to pay compensation to that value (even together with any consequential losses), then it would follow that that person would be entitled, in substance, to compulsory acquire my house. The mere fact that it may, therefore, be possible to put a value on property rights lost does not, of itself, mean that damages are necessarily an adequate remedy for the party concerned is entitled to its property rights instead of their value. Viewed in that way, damages would not be an adequate remedy for AIB. In particular, a failure to grant interlocutory relief at this stage would mean, in practice, that imposing some form of springboard injunction after the trial would be largely redundant. If the defendants are permitted to avail of what transpires to be (after trial) an unlawful head start for the period between now and trial, it will become virtually impossible to undo that head start in any practical way whatever the findings of the court at trial might be. In those circumstances, it seems to me that AIB would suffer irremediable loss to its property rights in the event that it should not obtain an interlocutory injunction now but should succeed at trial.

8.3 Like considerations lead me to take the view that the same situation would apply in the case of the defendants. If the defendants

are now injuncted but succeed at trial they will, of course, be entitled to damages on the basis of AIB's undertaking as to damages. However, they will have been deprived of their right of doing business in an open and fairly competitive way in the intervening period. While it may (although a difficult task) be possible to attempt to calculate any losses suffered and award damages accordingly, it can equally be said that AIB should not, by paying damages, be entitled to secure an absence of competition to which it was not otherwise entitled. For those reasons I am not satisfied that damages would be an adequate remedy either for AIB in the event that it fails to get an injunction but succeeds at trial or for the defendants in the event that they have an injunction imposed on them at this stage but succeed at trial. In that context it is necessary, therefore, to turn to the balance of convenience.

9. Balance of Convenience

9.1 I have already analysed many of the factors which go into the balance of convenience under the heading of "adequacy of damages". One additional factor must be placed in the mix. Counsel for Centralis argues that, as part of the exercise of assessing the balance of convenience, I should take into account the fact that the making of an order at this stage would involve imposing an obligation (which may, after trial, turn out to be one not justified) on Centralis not to compete openly with relevant AIB entities in other jurisdictions, either in their current form or as subsidiaries of Capita in the event that the Capita take over completes. Centralis is, of course, in the ordinary way, fully free to compete with AIB in any way which it wishes. The court must necessarily weigh in the balance any irremediable consequences for Centralis in interfering with its ability to so compete. On the other hand, if AIB is correct in its case (and I have already found that there is a fair issue to be tried in that regard), then Centralis will be using what might loosely be termed AIB's intellectual property rights (*i.e.* confidential information) and goodwill (*i.e.* access to AIB's customers by AIB IFS personnel whilst still in the employ of AIB IFS) in circumstances where those intellectual property rights and goodwill had been unlawfully removed from AIB.

9.2 A further point made on behalf of Centralis was that an order of the type sought might render Centralis's business unviable. That an order would affect Centralis's business cannot be doubted. The evidence concerning its viability was, in my view, however, extremely vague. It also needs to be noted that the extent to which there would be any permanent damage to Centralis's business which would not, at least to a material extent, (if not, for the reasons earlier analysed, completely) be capable of being dealt with in damages would depend on the length of any injunction. I, therefore, propose revisiting the question of the balance of convenience when I have considered the nature of any order to which AIB might, arguably, be entitled.

10. The Nature of the Order

10.1 As already noted the only legitimate purpose of a springboard injunction is to put in place measures designed to redress an improper head start in competition obtained by unlawful activity. It follows that the only orders which can be made are those which are reasonably necessary to achieve that end. That overall consideration has potential to limit both the scope of orders that can be made and the length of time for which any such orders might be in place. There is jurisprudence on the question of the scope of orders which is of some relevance here.

10.2 In *Roger Bullivant Ltd v Ellis* [1987] IRLR 491 Nourse L.J. concluded that a springboard injunction:

> "[…] should not normally extend beyond the period for which the unfair advantage may reasonably be expected to continue."

In coming to that view, Nourse L.J. had regard for three factors, namely that:

> "[…] such an advantage cannot last forever, secondly, that the law does not restrain lawful competition and, thirdly, that in restraining unlawful competition it seeks to protect the injured and not to punish the guilty […]".

10.3 The order granted in *Sectrack NV v Satamatics Ltd & ors* [2007] EWHC 3003 (Comm), although cited by AIB, does not appear to offer much assistance to the court as it is distinguishable on its facts to those which this court is now faced. In Sectrack on the grounds that the second defendant failed to provide disclosure, which was in breach of court order, the court was deprived of the ability to accurately assess the extent of the unfair competitive advantage which was said to have been gained in breach of confidence and therefore opted to continue the injunction until trial.

10.4 In *SG & R Valuation Service Co v Boudrais and others* [2008] EWHC 1340 (QB), Cranston J. observed, at para. 29, that:

> "The springboard operates for a period until the information is public, the confidence is lost, or for as long as it can be estimated the information can be lawfully assembled."

10.5 In *Vestergaard Frandsen A/S and others v Bestnet Europe Ltd and others* [2009] EWHC 1456 (Ch) Arnold J. held that in relation to a springboard injunction:

> "[…] the court must be careful to ensure that such an injunction does not put the claimant in a better position than if there had been no misuse."

10.6 Finally, in *Net Affinity*, Dunne J. granted an injunction for a period of one year to prevent the defendant from:

> "soliciting or transacting business in competition with the business of [the plaintiff] from any persons, corporations or bodies who within the period of two years preceding the date of termination of her employment had been customers of [the plaintiff] and where [the defendant] had dealings with such customer."

Dunne J. also granted injunctive relief to prevent the defendant from breaching her duty of confidentiality to her previous employer as set out in express terms in her contract of employment but the court did not think that it is necessary in order to protect the legitimate interests of the plaintiff to grant an injunction against the defendant which would have the effect of preventing her from taking up employment with her new employer. In addition, Dunne J. directed that during the period of the injunction, the defendant should not approach, solicit or deal with any existing customers of the plaintiff. The reasoning for this provision, which also lasted for one year, was that the contractual arrangements between the plaintiff and its clients were such as to involve annual contracts which are renewable accordingly. Finally, the court provided that

> "[i]f it were the case that another employee of [the new employer] approached, solicited or dealt with an existing customer of [the plaintiff] it would be virtually impossible to establish that the contact between [the new employer] and the existing customer did not arise from some form of contact through [the defendant]. To that extent it seems to me

> that it would be appropriate to grant injunctive relief against [the new employer] which would likewise prevent the new employer] from soliciting, approaching or dealing with any existing clients of [the plaintiff] for a period of twelve months."

10.7 Applying that jurisprudence, I am satisfied that it would, in principle, be appropriate to make an order restraining the solicitation of clients who are customers of AIB IFS as of August, 2010. However, for the reasons set out in *Vestergaard Frandsen A/S*, I do not believe that it would be appropriate to make an order precluding the concluding of contracts with such clients in cases where there was no solicitation for to do so would place AIB in a better situation than they would have been but for the conduct complained of. I am mindful of the fact that it might, in practice, be difficult to establish whether there had been solicitation in a case where it could be shown that a client of AIB IFS had moved to Centralis. However, that difficulty of proof would not, in my view, justify making an order which would prevent AIB IFS clients from moving to Centralis if they wished and in circumstances where no solicitation on the part of any of the defendants had occurred. I am satisfied that the making of a no solicitation injunction is reasonably necessary to preclude the defendants from having the benefit of having arguably jumped the gun in respect of either solicitation or putting in place measures designed to facilitate the transfer of clients.

10.8 On the basis of the reasoning of Dunne J. in *Net Affinity,* I am satisfied that it is appropriate that the scope of the solicitation injunction should also be extended to include Centralis.

10.9 So far as the solicitation of employees is concerned, I find it difficult to conclude that an injunction restraining same is reasonably necessary. That there is evidence of improper solicitation at a time when the personal defendants were still employees of AIB is undoubtedly the case. However, it seems likely that any one who was influenced by that solicitation has already transferred their affiliations to Centralis. Any damage caused by any improper solicitation that may be found to have occurred under this heading is, therefore, past damage. Given that Centralis was entirely free to headhunt AIB IFS employees (provided that such employees terminated their arrangements with AIB IFS in accordance with their contractual obligations) it seems to me that to prevent any current solicitation would be more inclined to prevent legitimate competition for the services of valued staff rather than to prevent Centralis from building on anything that might have been improperly done by the individual defendants prior to the termination of their contracts of employment.

10.10 I am satisfied, for the reasons already analysed, that some of the information retained by individual defendants is confidential information whose use can legitimately be prevented. In that regard it is necessary to set out briefly the jurisprudence concerning the limits of what can properly be said to be confidential information.

10.11 In *Faccenda Chicken Ltd v Fowler and others* [1986] 1 All ER 617, Goulding J. in the High Court provided the following clarification as to the categories of information that an employee may come into contact with during the course of his employment and the respective obligations thereby arising in respect of confidentiality:

> "In my view information acquired by an employee in the course of this service, and not the subject of any relevant express agreement, may fall as regards confidence into any of three classes. First there is information which, because of its trivial character or its easy accessibility from public sources of information, cannot be regarded by reasonable persons or by the law as confidential at all. The servant is at liberty to impart it during his service or afterwards to anyone he pleases, even his master's competitor. An example might be a published patent specification well known to people in the industry concerned […]. Second, there is information which the servant must treat as confidential, either because he is expressly told it is confidential, or because from its character it obviously is so, but which once learned necessarily remains in the servant's head and becomes part of his own skill and knowledge applied in the course of his master's business. So long as the employment continues, he cannot otherwise use or disclose such information without infidelity and therefore breach of contract. But when he is no longer in the same service, the law allows him to use his full skill and knowledge for his own benefit in competition with his former master and […] there seems to be no established distinction between the use of such information where its possessor trades as a principal, and where he enters the employment of a new master, even though the latter case involves disclosure and not mere personal use of the information. If an employer wants to protect information of this kind, he can do so by an express stipulation restraining the servant from competing with him (within reasonable limits of time and space) after the termination of his employment. Third, however, there are, to my mind, specific trade secrets so confidential that, even though they may necessarily have been learned by heart and even though the servant may have left the service, they cannot lawfully be used for anyone's benefit but the master's."

The case was thereafter appealed to the Court of Appeal where the court affirmed the decision of Goulding J., though some doubt was raised in relation to the ability of an employer to use a restrictive covenant to protect information that was confidential but not a trade secret.

10.12 In *Pulse Group Ltd and another v O'Reilly and another* [2006] IEHC 50, in following the rationale in Faccenda Chicken Ltd, I noted at para. 3.4 that:

> "[…] in summary, the law is clear. In the absence of an express term in a contract of employment the only enduring obligation on the part of an employee after his employment has ceased is one which precludes the employee from disclosing a trade secret."

10.13 It is clear, therefore, that an employee is entitled to bring that employee's general skill with him wherever he may go. It is only information that goes beyond general skill and knowledge which cannot be used against a former employer. So far as the names of clients of AIB IFS are concerned I am, on balance, satisfied that those names were either matters which relevant individual employees would have known themselves (given the intimate connection which, having regard to the nature of the business, employees had with the clients with whom they dealt) or was so easily ascertainable from publicly available materials that it could not be said to have any material confidentiality attaching to it. However, details of the commercial arrangements between those clients and AIB IFS were undoubtedly confidential. There is, in my view, therefore, at least an arguable case that some confidential information was retained and is likely to be used and that, in turn, the use of such information should be restrained.

10.14 Finally, it is necessary to consider the question of the length of any restriction that might be considered appropriate. In all the circumstances of the case, I find it difficult to see how, on the evidence currently available, a court at trial could conclude that an injunction of any period longer than six months would be necessary to undo any improper head start obtained. The value of the head start needs to be seen against the fact that much could have been done by the individual defendants and Centralis in setting up in competition to AIB IFS in respect of AIB IFS's customer base without acting unlawfully. It is only to the extent that there is an arguable case that unlawful means were adopted to enhance or speed up the manner in which that competing business could be established that restraint is appropriate. It must be recalled that contracts in this business are typically renewable on a three month basis. Any restraint longer than six months would, in my view, on the basis of the evidence currently available (clearly in the event

that different evidence emerges prior to trial, the trial judge may take a different view) would amount to imposing a restraint on competition rather than a reasonable measure designed to undo the head start. It would smack of a disqualification rather than a handicap.

10.15 It also seems to me that the period of any injunction must logically be seen to have to commence at the time when each of the defendants gave undertakings to the court. While the undertakings then given are not in exactly the same form as the injunctive relief which I am now considering, those undertakings must, necessarily, have already imposed a limitation on the way in which the individual defendants and Centralis did and can do business. In those circumstances it seems to me that the maximum injunction that could be contemplated is one lasting for six months from the 20th September last, being an injunction which would run out on the 20th March next.

10.16 In the context of the more limited form of injunction both as to scope and as to time which I have, for the reasons just analysed, decided might be appropriate, it seems to me that the balance of convenience would favour the grant of such an injunction. While the presence of such an injunction will, undoubtedly, interfere with the business of both the individual continuing defendants and Centralis, it will only do so for a further period of just over five months. While, for the reasons already analysed, I am not satisfied that damages would be an adequate remedy in the event that the defendants succeed at trial and have to rely on AIB's undertaking as to damages, nonetheless I believe that damages would go a much longer way towards adequately compensating the defendants in that eventuality than damages would go towards compensating AIB in the event that it were not to obtain an injunction at this stage but were to succeed at trial.

10.17 It follows that I am satisfied that AIB is entitled to an interlocutory injunction in respect of soliciting its customers as of August, 2011, concluding agreements with those customers in respect of whom solicitation has already occurred and in respect of the use of confidential information. That injunction will last until the 20th March, 2012. The scope of the limitation on the use of confidential information is, in my view, also connected to the final issue which arises which concerns the application on behalf of AIB to have that information returned. I, therefore turn to that question.

11. Scope of Confidential Information

11.1 It seems to me that any order which the court might be invited to make either requiring the return of confidential information or precluding its use requires a reasonable degree of precision so that any party bound by the order will fully understand what their obligations are. I am satisfied that the defendants were entirely correct in their original complaint that the orders sought by AIB under these headings were impermissibly vague. There is little point in the court making an injunction which in truth begs the question between the parties. Where there is a dispute about what is and what is not confidential information, then an injunction restraining the use or requiring the return of what is, in the order, described as confidential information is pointless. The parties here do not have a common understanding of what is to be regarded as confidential.

11.2 I have already indicated that it seemed to me that some of the information in respect of which complaint is made by AIB does not amount to confidential information. The names of customers were readily ascertainable. Undoubtedly, the commercial terms on which those customers did business with AIB IFS is confidential. More difficult issues arise in respect of the download referred to earlier. As analysed earlier, the business carried on by AIB IFS was somewhat unusual in that a great deal of the confidential information which AIB IFS might have at any given time was, in truth, information which was primarily confidential to its customers. AIB IFS's interest in maintaining the confidentiality of that information was not, in itself, for the purposes of its own business but rather for the maintenance of its reputation as an entity which could be trusted to keep confidential the business of its clients. I do not doubt that a reputation of that type would be of very considerable importance to the maintenance of the type of business with which I am concerned.

11.3 However, the primary confidence in respect of any such information is the confidence of the client or customer. If such a customer were to legitimately move its business to Centralis (or, indeed, anyone else) then that customer would, of course, be entitled to have access to its own records as held on its behalf by AIB IFS. No breach of confidence could arise, therefore, in respect of a client who moved their business from AIB IFS to Centralis for in those circumstances AIB would have no legitimate continuing interest in the information concerned save to the extent of ensuring that the information should not be seen to have been disclosed improperly by AIB IFS personnel.

11.4 In the light of those general observations, it seems to me that the extent of the definition proposed by AIB of confidential information for the purposes of same being included in a schedule to the order sought (by reference to which use of such information is sought to be prohibited and the return of such information is sought to be secured) is both too vague and too wide. I propose hearing AIB further on a more limited schedule which meets the criteria which I have already addressed.

12. Conclusions

12.1 It follows that AIB is entitled to an interlocutory injunction against Mr. Foley, Mr. McEvoy, Mr. O'Reilly and Centralis in respect of:-

A. Soliciting customers of AIB as of August, 2010, such customers to be set out in a schedule to the order;

B. Concluding business with the same customers in any case where there has already been solicitation of the customer concerned;

C. Using confidential information to be defined with much greater precision in a schedule to be attached to the order with the terms of that schedule to be the subject of further submissions having regard to the analysis set out earlier in this judgment; and

D. Returning confidential information by reference to the same or alternative schedule to be likewise the subject of further debate.

12.2 The injunction will be expressed to last until the determination of the trial of the action or the 20th March, 2012, whichever be the earlier. While it seems unlikely that it will be possible to put in place measures such as would lead to a trial and judgment before the 20th March, nonetheless it seems to me that, having regard to the onerous nature of the injunction imposed, the potential consequences for all parties and the important reputational issues arising, all efforts should be made to secure the earliest possible date for trial of these proceedings. I will again hear counsel further on the directions which are necessary to achieve that end.