

THE HIGH COURT

[2015/3350P]

BETWEEN

**DENIS O'BRIEN
AND
RADIO TELEFIS EIREANN**

PLAINTIFF

DEFENDANT

[2015/3364P]

BETWEEN

**IRISH BANK RESOLUTION CORPORATION LTD
(IN SPECIAL LIQUIDATION)**

**AND
RADIO TELEFIS EIREANN**

PLAINTIFF

DEFENDANT

Ex tempore JUDGMENT of Mr. Justice Binchy delivered on the 12th day of June, 2015

1. By notice of motion dated 2nd June, 2015, the defendant in each of these proceedings seeks to vary the court order already made in each case on 21st May, 2015.

2. The application arises out of developments since the order of the court on 21st May, 2015 and in particular,

- (1) certain utterances made by Catherine Murphy TD on 27th May, 2015 and 28th May, 2015. The order was already varied on 2nd June to reflect these utterances;
- (2) a statement of Mr. Mike Aynsley of 28th May 2015 and;
- (3) other information in the public domain.

The motion came on for hearing before the Court on 10th June, 2015, and on the evening before the hearing Deputy Pearse Doherty TD made further utterances in Dáil Éireann which counsel for the defendants contended, and with which counsel for Mr. O'Brien agreed, further altered the background against which the original order was made.

3. Arising out of this the following variations to the existing court orders were agreed:

- 1. The original court order should no longer apply to the statement of Mr. Mike Aynsley dated 28th May, 2015 (as per the relief sought in paragraph 2(c) of the Notice of Motion),
- 2. The order sought should be amended to afford the relief sought in paragraph 2(d) of the Notice of Motion save that that paragraph should be amended so that it simply refers to information, previously determined by the Court to have been confidential to Denis O'Brien in circumstances where that information is in the public domain, with the remainder of that paragraph of the Notice of Motion to be deleted.

4. Counsel for Mr. O'Brien further agreed that, as far as Mr. O'Brien is concerned, all of the information referred to in the script of the broadcast proposed to be made by the defendant and which is of concern to Mr. O'Brien, is now in the public domain and accordingly Mr. O'Brien no longer seeks to prevent the broadcast of the contents of that script.

5. However, counsel for IBRC, Mr. Fitzpatrick BL, submits to the Court that insofar as any of the content of the proposed script relates to matters which are the subject of legal professional privilege, that those parts of the script should continue to be the subject of the court order. Counsel for the defendant, Mr. Holland SC, submits that while legal professional privilege is absolute, it cannot extend to information that is already in the public domain.

6. Counsel for the defendant further submits that the court order should be vacated in its entirety at this stage for the following reasons:-

- 1. There is no longer any purpose served by the existing order, in view of the extent of information now in the public

domain and the order should not be held as a "sword of Damocles" over the defendant in particular and the media in general;

2. Everything which the defendant originally intended to publish is now in the public domain and there is no point in seeking to injunct that publication.

3. The defendant has at all times behaved responsibly in regard to the matter. In light of the Court's findings in relation to the plaintiffs' right to confidentiality in his banking documentation, the defendant is aware of its obligations, and having regard to the manner in which it has dealt with the matter to date, there is no reason to believe that it will not continue to act responsibly or do anything to intrude upon the interests of the plaintiff, pending a full hearing of the proceedings.

4. The Court should have regard to Article 10 of the European Convention on Human Rights and should not continue an order of prior restraint in circumstances where, in the submission of the defendant, it is no longer necessary, and there is no pressing social need to do so.

5. As far as the IBRC is concerned, while it is acknowledged that legal advice benefits from absolute privilege, once the information to which that legal advice relates is in the public domain, the privilege is spent and should not be subject to an order of restraint.

7. While the defendant originally intended, in support of this application, to give an undertaking to the Court not to publish any confidential material not previously in the public domain relating to the plaintiffs' personal banking arrangements with IBRC (subject to certain terms), the defendant is no longer willing to give that undertaking in view of the intervention in Dáil Éireann last evening of Deputy Pearse Doherty TD. The defendant is concerned that even an undertaking, while less coercive than an injunction, leaves it susceptible to the processes of contempt of court in the same way as if an injunction is breached.

8. In summary, it is the submission of the defendant that since the very information the publication of which the plaintiff sought to restrain is now in the public domain, the continuance of the court order cannot be justified and nor therefore can the defendant reasonably be expected to give an undertaking to the Court in relation to that same information.

9. Counsel for Mr. O'Brien submits that it is not correct to say that all of the information to which the existing order relates is now in the public domain. While it is accepted by Mr. O'Brien that all of the information relating to him referred to in the script which the defendant proposed to broadcast is now in the public domain, the order is not confined to the script but embraces all confidential information relating to the plaintiff's banking affairs with IBRC. Counsel submits that the defendant has made it clear that it has other information in its possession relating to the plaintiff's banking affairs which it has declined to identify and therefore Mr. O'Brien is entitled to the continuing force of the order insofar as it includes material that is not in the public domain.

10. It was further submitted on behalf of Mr. O'Brien that one of the remaining benefits of the order is that it is directed to persons having knowledge of the making of the order which must include many others. Since Mr. O'Brien is unaware as to who may be in possession of confidential information concerning his banking affairs, the order has a continuing worth for Mr. O'Brien.

11. Counsel for IBRC, submits that since it is the defendant who seeks to discharge the existing order, it is for the defendant to satisfy the Court as to why the order should be discharged. Mr. Fitzpatrick submits that when IBRC first received a letter from the defendant which made it clear that the defendant was in possession of confidential information arising out of the banker/customer relationship with Mr. O'Brien, and also that it was in possession of legal advice concerning that relationship, IBRC's legal advisors wrote to the defendant requesting an undertaking that it would not publish either the confidential information or the legal advice, and the defendant declined to give that undertaking. That remains the position of the defendant in connection with this application.

12. Insofar as it is argued by the defendant that legal advice has come into the public domain, Mr. Fitzpatrick BL submits that there is no evidence before the Court in this regard and nor, do the comments of Deputy Doherty TD in Dáil Éireann on 9th June, 2015 last, refer to legal advice.

13. Mr. Fitzpatrick BL submits that the script proposed to be broadcast by the defendant contains paragraphs which refer, directly or indirectly, to legal advice and that these paragraphs should remain the subject of the existing court order. It was further submitted that the defendant is seeking to reargue points upon which the Court has already made a decision, and that there can be no objection to an order already made by the Court enjoining a person for publishing legal advice.

Decision

14. The defendant makes its application on the grounds that the injunction granted by the Court on 21st May, 2015 no longer serves any useful purpose by reason of the information that has been put in the public domain since 21st May. The consequence of this, the defendant submits, is that the content of the script which the defendant proposed to broadcast no longer attracts the benefit of the right to confidentiality asserted by the plaintiffs.

15. As far as the script is concerned, Mr. O'Brien accepts that from his point of view there is no further purpose served by the continuance of the court order. However, IBRC claims that those parts of the script that clearly refer to legal advice or that are drawn from legal advice received by IBRC, are not in the public domain and remain subject to the protection of legal professional privilege.

16. However, it is submitted on behalf of Mr. O'Brien that the scope of the existing order refers not just to the contents of the script, but to all confidential information relating to the plaintiff's personal banking arrangements with IBRC (save as excepted already in the order). Having obtained the benefit of that order, the plaintiffs are entitled to the continuation of that order pending the full trial of the proceedings. It was submitted on behalf of the plaintiffs that they should not have to rely on the defendant to act responsibly by not putting in the public domain information to which the existing order relates, particularly in circumstances where the defendant fully contested the plaintiffs' application for a court order and will not give an undertaking to the Court *in lieu*.

17. The defendant continues to hold confidential information and documentation belonging to the plaintiffs, and has declined, to identify the documentation in its possession. The plaintiffs have established a convincing case that this documentation is the subject of a right of confidence that falls within one of the express exceptions to Article 10 of the European Convention on Human Rights. If the case proceeds to a full trial, and if the plaintiffs succeed, they will obtain orders requiring the return of that documentation as well as a permanent injunction regarding publication of the information.

18. Having already granted the plaintiffs orders restraining publication, the Court is now being invited to lift those orders in relation to

documentation and information the content of which is unknown and which may or may not be already in the public domain. The Court is being asked to recognise that the defendant has acted responsibly to date and to accept that there is no reason why the defendant will not continue to do so.

19. It is indeed the case that the defendant has acted responsibly at all times in regard to this matter and I believe it is reasonable for the defendant to make this application in the light of developments that have occurred since 21st May. However, notwithstanding those developments, which have been dramatic, it does not follow that the court order should not be continued in relation to information that has not yet come into the public domain; on the contrary, the rationale of the original decision of this Court still applies in relation to any documentation or information that has not yet come into the public domain.

20. While it is fair to say that there is no reason to believe that the defendant will not continue to act responsibly, having established a convincing case that they are likely to succeed at the full trial of the proceedings, the plaintiffs should not be required to rely on the good intentions of the defendant. And since the defendant does not wish to give an undertaking to the Court, it is not unreasonable to infer that the defendant wishes to leave open to it the possibility that it may publish information or documentation in its possession concerning the plaintiffs between now and the full trial of the matter, unless restrained by court order from doing so. It also needs to be borne in mind that Mr. O'Brien has presented evidence to the Court that he is likely to sustain significant financial losses, incapable of quantification, if his private banking affairs are put into the public domain. The Court has already found that damages would not be an adequate remedy if this were to occur. While Mr. O'Brien may already have sustained damage by reason of the information already put into the public domain, that in itself is not reason to suppose that he may sustain still further damage if more of his confidential information is published.

21. For all of these reasons I am of the view that it is not appropriate to vacate the existing order and that instead the appropriate course to take is to amend the order to take account of developments since it was originally made, as set out above.

22. Finally, it is necessary to consider those parts of the script intended to be broadcast that refer to or may reasonably be considered to be derived from legal advice. While Mr. Holland SC on behalf of the defendant has acknowledged the absolute nature of legal professional privilege, he has nonetheless submitted that:

1. Insofar as any information has come into the public domain that would in the ordinary course be the subject of legal professional privilege, that privilege cannot now be asserted by the plaintiffs because it is already in the public domain and no practical purpose is served by restraining its further publication by court order, even though the client may not have waived its entitlement to legal professional privilege;

2. Whether or not such information or documentation is already in the public domain, the Court should consider the entitlement to legal professional privilege in the context of Article 10 of the Convention and in particular as to whether or not a court order restraining publication is proportionate in the circumstances.

3. No purpose is served by restraining publication of material, the character of which is general comment rather than legal advice.

23. It was unnecessary to address in any detail the question of legal professional privilege in the context of the original court order for two reasons, firstly because the order of 21st May embraced those parts of the script over which legal professional privilege is claimed, and secondly because the defendant accepted the absolute nature of legal professional privilege.

24. However, now that Mr. O'Brien no longer objects to publication of the script, and the defendant wishes to publish the script without redaction, it is necessary to consider this issue because IBRC asserts an entitlement to legal professional privilege over certain parts of the script. Mr. Holland SC has invited the Court to give judgment on the issue of principle raised by IBRC *i.e.* to assume that the particular parts of the script that refer to legal advice (expressly or impliedly) are not in fact in the public domain, and to consider whether any purpose is served by continuing to restrain publication of the same?

25. Counsel for IBRC has referred me to a decision in which consideration has been given to the issue of whether or not legal professional privilege may have to give way to disclosure in support of some other public interest, in the case of *McGrath v. Athlone Institute of Technology* [2011] IEHC 254 where Hogan J. stated:

"Having reached this conclusion, it is unnecessary for me to consider at any length the argument advanced by Ms. Walley SC to the effect that the Court enjoyed some residual jurisdiction to override the privilege where the interests of justice so required. It is true that there is an exception of long standing to the effect that privilege cannot be used to mask a crime (*R v. Cox and Railton* (1884) 14 QBD 153), but beyond this any further exceptions would gnaw at the core and essence of the right to take legal advice. In a free and democratic society, based on the rule of law, the right of the citizen to take such advice is, of course, fundamental. If the court enjoyed a free ranging jurisdiction to override such advice, this would be tantamount, as the US Supreme Court has observed, to a "prohibition upon professional advice and assistance". See *Mutual Insurance Co. v. Schaefer* 94 U.S. 467 [1877]."

26. Mr. Holland SC submits that insofar as the plaintiffs seek an equitable remedy, the Court always retains discretion as to whether to grant the order sought and that that discretion should be exercised in favour of the defendant if the information has come into the public domain. While I will, if necessary hear submissions as to whether or not any of the information contained in the script which is derived from legal advice has come into the public domain, at this point I am not disposed to vacate the order to the intent of enabling the defendant to publish any information that discloses legal advice given to IBRC, or is clearly derived from legal advice given to IBRC or communications between IBRC and its legal advisers unless I am satisfied that such information is already in the public domain.

27. Finally, insofar as Mr. Holland SC submits that the Court should conduct a balancing exercise between Article 10 of the Convention and the right to confidence in documents that are protected by legal professional privilege, I am satisfied that at this interlocutory stage, and pending full argument on the point, it is appropriate that the defendant's rights under Article 10 of the Convention should give way to IBRC's rights to legal professional privilege. It has been submitted that the court should identify a pressing social need before the making of an order of prior restraint of publication and this is correct. In this context "pressing" means 'vital' or 'important' rather than urgent. In my view, the protection of the absolute nature of legal professional privilege is a pressing social need. It would be utterly inappropriate for a Court, at interlocutory stage, to make a decision which would have the effect of eroding, even to the slightest degree, the right of citizen to take legal advice secure in the knowledge that the confidence in advice given will always be protected by the Courts. If that confidence is undermined, the damage to the administration of justice would be, in my view, immeasurable.

