

THE HIGH COURT

Record No. 2015/3350P

BETWEEN:

DENIS O'BRIEN

Plaintiff

-AND-

RAIDIÓ TEILIFÍS ÉIREANN

Defendant

AFFIDAVIT OF DAVID MURPHY

I, DAVID MURPHY, Business Editor of Raidió Teilifís Éireann, of Montrose, Donnybrook, Dublin 4, aged eighteen years and upwards, MAKE OATH and say as follows:

1. I am the Business Editor of Raidió Teilifís Éireann ["RTÉ"], the Defendant, and I make this affidavit for, on behalf of and with the consent of the Defendant from facts within my own knowledge save where otherwise appears and where so otherwise appears I believe those facts to be true and accurate.
2. I beg to refer to the proceedings and pleadings herein when produced. I make this affidavit in response to the Plaintiff's application for interlocutory injunctions by Notice of Motion dated 30th April 2015 and to the grounding affidavit thereof sworn by the Plaintiff on the 30th April 2015 (hereafter "the Plaintiff's affidavit").
3. I am currently working on a short news report, which, *inter alia*, examines efforts by the Plaintiff, in 2012/2013, to seek an extension to the repayment period of loans he had with the Irish Bank Resolution Corporation [IBRC], formerly Anglo Irish Bank. The focus of the report is not so much on the personal finances of the Plaintiff as on the governance of IBRC

4. This news report was originally due to be broadcast on the Six One news programme on 1st May 2015 but it was postponed until 5th May 2015 to give the parties concerned additional time to reply. The broadcast is now further postponed pending a determination of the present injunction application.
5. As averred to by the Plaintiff at paragraph 8 of his affidavit, a letter dated 28th April 2015 was sent to the Plaintiff informing him of certain matters and

offering him a right of reply prior to broadcast. Letters in similar terms were sent to the former CEO of IBRC, Mr Mike Aynsley, the former head of IBRC specialised asset management, Mr Richard Woodhouse and the special liquidator, Mr Kieran Wallace.

6. The Defendant is in possession of information relating to certain loan facilities which the Plaintiff had with IBRC. I assert journalistic privilege over the identity of the source of this information.
7. As the draft script reveals, it is no part of the Defendant's intent to assert any wrongdoing, iniquity or misdeed by the Plaintiff or by the liquidators of IBRC.
8. However, RTE does assert that the dealings between the Plaintiff and the former management of IBRC and between the Plaintiff and the liquidators of IBRC are matters of legitimate public interest outweighing the acknowledged interest of the Plaintiff and the bank in the confidentiality of their business relationship - such that no interlocutory relief should be granted.

Denis O'Brien

9. The Plaintiff is a billionaire businessman of international renown who has been in the public eye for the last two decades. In 1995 he set up and chaired the Esat Telecom Group which won the second mobile phone licence granted in the State.

Having sold Esat Telecom Group, he established and chairs the Digicel Group – a major telecoms provider in the Caribbean of which he owns 94%. The Digicel website describes him as *“one of Ireland's leading entrepreneurs with extensive investments across several sectors including international telecoms, radio, media, property, aircraft leasing, golf and other leisure interests.”*

Communicorp Group Ltd, founded and owned by the Plaintiff, describes itself as Ireland's premier media company and the home of some of Europe's leading commercial media brands. Communicorp owns and operates some of the largest independent radio networks in Ireland, Eastern Europe, and the UK. It is one of the fastest growing radio networks in the world with 27 radio stations in a number of European countries including two national radio stations - Newstalk and Today FM - and Dublin's 98FM. Via Communicorp the Plaintiff is the largest owner of private radio stations in Ireland.

The Plaintiff is also the largest shareholder (29%) in the Independent News & Media group – arguably Ireland's largest media group. He has significant interests in other prominent companies – including Topaz which, with over 330 stations across Ireland, describes itself as on its website as “Ireland's largest fuel and convenience brand”, and the Siteserv Group, which is involved in infrastructure and facilities management, including the installation of water meters.

He has been a deputy Governor of the Bank of Ireland.

The Plaintiff has featured in the public spotlight for numerous other reasons including very significant philanthropy, his investment in Celtic Football Club in 2001, his chairing of the Special Olympics in 2002/03, his financial contributions to Irish sport – including the part-funding of the remuneration of

the manager of the Irish soccer team, his featuring in the Moriarty Report in 2011 and his appearance with the Taoiseach for the ringing of the opening of the New York stock exchange in 2012. He is a member of the UNESCO Broadband Commission for Digital Development.

The Sunday Independent Rich List published on 11th May 2014 stated his net worth to be approximately €3.8 billion and Forbes magazine now estimates it at \$6.9 billion.

As such the Plaintiff has inevitably and knowingly exposed himself to close scrutiny of his acts by the media. In this regard, I beg to refer to profiles of the Plaintiff from the Forbes, Digicel and Communicorp websites and certain extracts from the Communicorp website upon which pinned together and marked "DM 2" I have signed my name prior to the swearing hereof.

I also beg to refer to a profile which currently appears on the *Irish Independent* website and was first published on 8th March 2015 upon which marked "DM 3" I have signed my name prior to the swearing hereof.

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

IBRC

11. While it is not feasible to set out the history of IBRC in detail, by way of background, in part taken from the Department of Finance website:

- a. In January 2009, as a result of the national banking crisis, the former Anglo Irish Bank was nationalised pursuant to the Anglo Irish Bank Corporation Act 2009 the long title to which described it as *An Act To Provide, In The Public Interest, For Maintaining The Stability Of The Financial System In The State*. Section 2 of the Act recorded that the Minister for Finance:

"has, in the public interest, the functions provided for under this Act because, after consulting the directors of Anglo Irish Bank, the Governor and the Regulatory Authority, the Minister is of the opinion that—

- (a) *there are serious concerns about the viability of Anglo Irish Bank, or would be if those functions were not performed,*

and

- (b) *the performance of those functions is necessary, in the public interest—*

- (i) *to remedy a serious disturbance in the economy of the State,*

- (ii) *to prevent potential serious damage to the financial system in the State and ensure the continued stability of that system, and*
 - (iii) *to preserve the capacity of Anglo Irish Bank to continue its operations as a going concern."*
- b. The State invested €4 billion in ordinary shares in Anglo Irish Bank in June 2009.
- c. The nationalisation of both Anglo Irish Bank and Irish Nationwide Building Society ("INBS") was provoked by their insolvency which required State investment of tens of billions of euro. This was a significant element of the national banking crisis of that time.
- d. The State made a capital injection of €100 million in the Irish Nationwide Building Society in 2010.
- e. Additional capital injections into Anglo Irish Bank and INBS were by way of promissory notes and by 31st December 2010 the total promissory notes held by Anglo Irish Bank and INBS was €30.6 billion. The promissory notes were exchanged for a portfolio of long-term government bonds.
- f. In July 2011, Anglo Irish Bank was merged with the Irish Nationwide Building Society, to form the IBRC. IBRC is wholly State-owned.
- g. In March 2012 pursuant to Section 3 of the Anglo Irish Bank Corporation Act 2009 the Minister For Finance specified a Relationship Framework for his relationship with IBRC, the preamble to which recorded that "In the context of the financial crisis, the Bank has received and continues to receive significant support from the State to prevent potential serious damage to the financial system in the State. This support takes various forms, including capital injections, asset relief and various guarantees."
- h. The Relationship Framework, inter alia, identified the objectives of the Minister for Finance as including:
 - *to minimise cost and other risk to the Exchequer and the taxpayer;*
 - *to remedy a serious disturbance in the Irish economy by helping to restore the reputation and enhance the stability of the financial system in the State;*
 - *to ensure that the Bank operates in accordance with the public interest.*
- i. The Special Liquidation of IBRC by Order of February 2013 proceeded from the Irish Bank Resolution Corporation Act 2013 – legislation passed overnight by the Oireachtas. The recitals to the said Act state the following:
 - i. WHEREAS it is necessary, in the public interest, to provide for the orderly winding up of the affairs of IBRC to help to address the continuing serious disturbance in the economy of the State
 - ii. AND WHEREAS vital assistance has been provided by the State to maintain the functioning of IBRC to support the financial stability of the State;

- iii. AND WHEREAS vital assistance has been provided by the Central Bank of Ireland to maintain the functioning of IBRC to support the stability of the Irish financial system;
- iv. AND WHEREAS the maintenance of the functioning of IBRC is no longer necessary to support the financial stability of the State or the stability of the Irish financial system;
- v. AND WHEREAS it is necessary to end the exposure of the State and the Central Bank of Ireland to IBRC;
- vi. AND WHEREAS the winding up of IBRC is now necessary to help to restore the financial position of the State and to help to enable the State to re-establish normalised access to the international debt markets;
- vii. AND WHEREAS it is necessary in the public interest to ensure that the financial support provided by the State to IBRC is, to the extent achievable, recovered as fully and efficiently as possible;
- viii. AND WHEREAS the winding up of IBRC is necessary to resolve the debt of IBRC to the Central Bank of Ireland
- ix. AND WHEREAS in the achievement of the winding up of IBRC the common good may require permanent or temporary interference with the rights, including property rights, of persons;
- j. One of the purposes of the liquidation, according to the Department of Finance, was to *"improve the health of the Irish banking sector by putting in place a longer-term solution for a significant part of the structural shortfall of bank financing that has emerged through the banking crisis."*
- k. The liquidation is, in financial terms, the largest liquidation in the history of the State. Assets of enormous value, effectively State property, – in particular loans and portfolios of loans – have been sold by the liquidators.
- l. Though it is generally believed to have proceeded successfully, at its commencement the liquidation involved significant risk to the State. Inter alia, according to the Department of Finance, "If, after an independent valuation exercise, the value of the assets sold by the Special Liquidators is not sufficient to compensate NAMA for the amount it paid for the net IBRC debt owed to the Central Bank, the Minister for Finance will be required to reimburse NAMA for the shortfall. If on the other hand, the value of the assets is sufficient to repay that debt in full, the Special Liquidators will retain surplus assets for the benefit of other unsecured creditors, including possibly *refunding the State for payments made under guarantees.*"
- m. As to the effect of the liquidation on borrowers from Anglo Irish Bank (as it was when lending), it was envisaged that many loans would be sold to third parties and according to the Department of Finance "All debts to IBRC remain due and payable in accordance with their terms. All loan payments should continue to be made. The Special Liquidators will be in direct contact with IBRC borrowers to notify them of any potential changes to payment details as a result of the liquidation. One of the objectives of the

Special Liquidators will be to achieve the best valuation of these assets through the liquidation, which includes continuing to collect on all outstanding debts.”

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

Controversy as to Governance of IBRC

13. According to documents released under the Freedom of Information Act 2014, prior to the liquidation of IBRC in February 2013, the governance of IBRC’s large transactions by its management became an issue of significant concern for the Department of Finance.
14. The Department’s briefing note in preparation for a meeting between the Minister for Finance and the Chairman/CEO of IBRC scheduled to be held on 25th July 2012, *inter alia*:
- a. refers to a *“continuing lack of regard for the views of the Department and Minister by senior management in IBRC”*
 - b. records concern at the relationship between the CEO and a named major debtor (not the Plaintiff).
 - c. states *“we are concerned at the large number of transactions that have been poorly executed under the direction of the current CEO. The performance of management in executing these transactions raises the question of the effectiveness of the CEO. The poor management displayed along with the increased level of public concern and political and media scrutiny that they commanded is damaging the credibility of the institution and by extension the State”*

Among these transactions were the well-publicised Siteserv transaction of March 2012; the sale of an office block in the US called Apthorp; the appointment of private equity group Blackstone without proper procedures; and the sale of the IBRC Wealth Management Unit.

The attached speaking notes

- assert the need to *“ensure that business is conducted at the bank in a manner which does not expose the bank to unnecessary criticism. In particular policies relating to..... dealings/relationships with clients”*
- record “extreme” dissatisfaction *“with the performance of IBRC management”*.

I beg to refer to a true copy of the briefing note upon which marked with the letters “DM 4” I have signed my name prior to the swearing hereof.

15. The minutes of the meeting of 25th July 2012 between the Chairman/CEO of IBRC and the Minister for Finance highlight the Minister’s concerns about

governance of the bank and, in particular, rumours of close relationships between senior management of the bank and large clients. It was acknowledged by the then CEO of the bank that there were close relationships with large clients but he asserted that these relationships were not inappropriate. He represented that *"the clients are managed to ensure a maximum return on all loans."* and confirmed a strong but not inappropriate relationship with the Plaintiff herein.

In this regard, I beg to refer to a true copy of the minutes upon which marked with the letters "DM 5" I have signed my name prior to the swearing hereof.

16. In relation to the sale of Siteserv – which came, in effect, under the control of the Plaintiff and in which over €100 million of its debt was written off at loss to the State – the Department of Finance raised concerns about the decision to allow the sales process to be conducted by Siteserv's advisors; the decision to exclude trade buyers; the timing of exclusivity when other bids were outstanding; and the decision to make a payment of €5 million to shareholders. This transaction, amongst others, has recently been the subject of a request to the special liquidators to review IBRC transactions involving the writing off of debts in excess of €10 million. I emphasise that it is no part of RTÉ's present concern to assert any wrongdoing by anyone – in particular the Plaintiff – as to the sale of Siteserv. The issue is relevant as a public controversy as to the governance of IBRC in circumstances in which the dealings between the Plaintiff and IBRC raise concerns as to the governance of IBRC in terms similar to some of those articulated by the Department of Finance. It will be seen that the draft script does not mention Siteserv.

In this regard, I beg to another Department of Finance briefing note upon which marked with the letters "DM 6" I have signed my name prior to the swearing hereof.

17. This note also records the Department's considerable dissatisfaction as to:
- i. the relationship between IBRC management and the Department
 - ii. the relationship between IBRC management and IBRC clients and reputational damage in consequence.

However the Plaintiff is not one of the IBRC clients mentioned – nor is it asserted that the Department had him, as it were, in mind.

18. As recently as yesterday evening there was discussion in Dáil Éireann in respect of the above issues during debate on a private members bill. In this regard, I beg to refer to a transcript of the debate upon which marked with the letters "DM 7" I have signed my name prior to the swearing hereof.

Relationship Between Denis O'Brien and IBRC – Pre-Liquidation

19. RTÉ has come into possession of certain documents relating to the Plaintiff's borrowings from IBRC and the management thereof by IBRC both before and after the commencement of the liquidation. I do not exhibit or identify those documents as I am fearful that by doing so I may disclose or tend to disclose the identity of the source thereof. I say that the account hereunder of my understanding of the dealings between the Plaintiff and IBRC is based on those

documents.

20.

[REDACTED]

21.

[REDACTED]

22.

[REDACTED]

23.

[REDACTED]

[REDACTED]

24.

[REDACTED]

25.

[REDACTED]

26.

[REDACTED]

27.

[REDACTED]

It amounts to an assertion of his failure and poor IDIC management, of

[REDACTED]

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

- management by senior IBRC management of relationships with major IBRC borrowers/clients;
- dissatisfaction with the performance of senior IBRC management, *inter alia*, as to large transactions;
- reputational damage to the State arising out of the foregoing.

[REDACTED]

28.

[REDACTED]

29.

[REDACTED]

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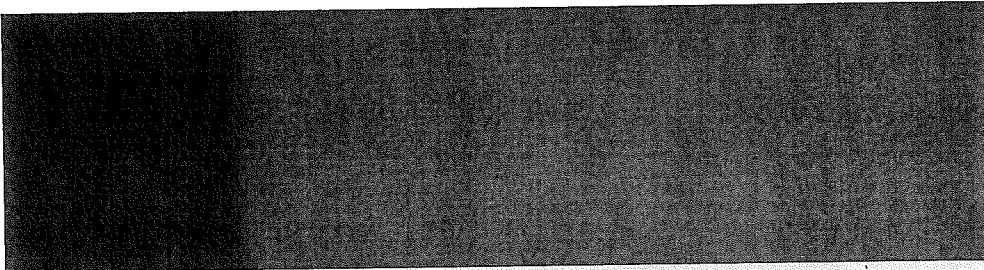
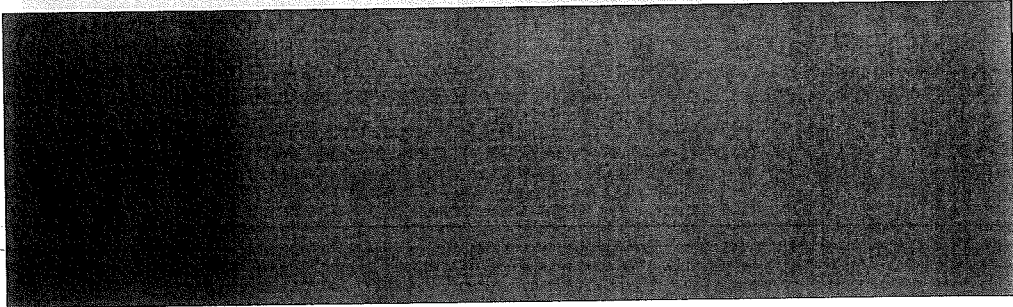
37.

38. I respectfully suggest that, from the point of view of the public interest, knowledge of these matters is relevant as bearing on:

a. the State's objective that the liquidation be completed expeditiously;



The Public Interest – Further Observations

39. As stated above, the briefing notes obtained under the Freedom of Information Act 2014 illustrate that the Department of Finance, which represented the interests of the taxpayer, had significant concerns about the governance of large loans in IBRC. When anything less than full value was achieved it was at a loss to the public purse at a time when the public finances were under exceptional pressure.
40. I believe that the publication of the information in the Defendant's possession, in terms contemplated in the draft script, even though confidential, is justified on the grounds of public interest for a reasons as set above and on which I will elaborate further below.
41. There is, I believe, a public interest of a real and weighty nature in publishing information about the manner in which the IBRC dealt with the Plaintiff as one of its most significant debtors. Such interest arises in circumstances where the bank has been bailed out by the public, the debts of the bank have been taken by the people of Ireland and the bank was run at the direction of or by persons appointed by the Minister for Finance. Against this background, there is a particular public interest in knowing certain information about the relationship between the bank and its principal customers.
42. The Plaintiff's dealings with IBRC are of themselves a matter of legitimate public interest given the size of his debt, his financial power, the fact that he has purchased assets from IBRC and his role in Irish life as described above.
43. 
44. 
45. The public will also have a legitimate interest in contrasting IBRC's dealings with a major debtor with its dealings with other debtors.
46. For the avoidance of doubt, I reiterate that nothing known to me indicates that the Plaintiff has engaged in wrongdoing, iniquity or misdeed. Rather, it is the prudent management of one of the bank's key clients is being called into question – as is whether the taxpayer's interests were best served.
47. In light of the foregoing, I believe and am advised that there is a sufficient

public interest to displace any confidentiality that exists between the Plaintiff and his bankers and, in this particular case the public interest in disclosure outweighs the Plaintiff's right to privacy and confidentiality. I believe that the publication of the news report will make a worthwhile contribution to a debate of general and genuine public interest.

48. I do not accept that the Plaintiff would suffer irreparable damage as a result of the news report that the Defendant intends to broadcast. I believe and am advised that any harm caused to the Plaintiff by the news report (and I do not believe that they will be any) would be reparable or compensated by an award of damages.
49. In particular I respectfully say that, financial institutions would "not like" to see the publication made is, it is suggested, completely irrelevant in itself. Moreover given his economic power, the suggestion that if the intended publication were made financial institutions would refuse to deal with the Plaintiff is fanciful in the extreme and, in any event, unsupported by evidence.
50. Accordingly I pray that the relief sought in the notice of motion be refused.

SWORN by the said DAVID MURPHY this

7th day of May 2015 at

7/8 Wilton Terrace

in the County of Dublin before me a
Commissioner for Oaths/Practising Solicitor and I
personally know the Deponent or the Deponent has
been identified to me by

who is personally known to me and
who certifies his/her personal knowledge of the
Deponent or the identity of the deponent has been
established by me by reference to a
containing a photograph of
the deponent before the affidavit was taken.

David Murphy

COMMISSIONER FOR OATHS/ PRACTISING
SOLICITOR

This Affidavit is filed on behalf of the Defendant by RTÉ Solicitors' Office,
Montrose, Donnybrook, Dublin 4, this 7th day of May 2015.

THE HIGH COURT

Record No. 2015/3350P

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DENIS O'BRIEN

Plaintiff

-AND-

RAIDÍO TEILIFÍS ÉIREANN

Defendant

AFFIDAVIT OF DAVID MURPHY

**RTÉ Solicitors' Office
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