THE HIGH COURT

RECORD NO: 2015/4888P

Denis O'Brien

Plaintiff

AND

Clerk of Dail Eireann, Sean Barrett, Joe Carey, John Halligan, Martin Heydon, Paul Kehoe, John Lyons, Dinny McGinley, Sean O Fearghail, Aengus O'Snodaigh and Emmet Stagg (Members of the Committee on Procedure and Privileges of Dáil Éireann), Ireland and the Attorney General

Defendants

JUDGMENT of Ms Justice Ní Raifeartaigh delivered on Friday 31st March, 2017

1. The principle of comity as between the legislature and the courts in a system embodying the separation of powers has been described as follows:

> "This principle is that of mutual respect and forbearance between the legislative and judicial branches, and it has been recognised by the courts as one of the foundations for the privileges (including the privilege of free speech) enjoyed by the House. … The relationship between the courts and

> Parliament is a matter of the highest constitutional significance. It should be, and generally is, marked by mutual respect and restraint. The underlying assumption is that what is under discussion or determination by either the judiciary or the legislature should not be discussed or determined by the other. The judiciary and the legislature should respect their respective roles."[1]

This case raises important issues as to the role of the Court when the principle of comity is breached. Is an individual entitled to invoke the jurisdiction of the courts where a member of the Houses of the Oireachtas has engaged in utterances which, if spoken outside the House, would constitute a breach of a court order obtained by the individual? While this arose in the present case in relation to the revelation of private banking information of the plaintiff, the implications are much wider and would arise whatever the private nature of the information published, be it information relating to a person's banking, taxation or other financial affairs, health or medical matters, relationships or sexual disposition, or any other information of a private and confidential nature. If a court order prohibits certain information from being published, and a member of the Dáil then publishes the information on the floor of the Dáil, has the Court any jurisdiction to entertain proceedings with regard to those utterances, or with regard to subsequent proceedings of the Committee on Procedure and Privileges arising out of a complaint in relation to those utterances? These are among the central questions in these proceedings.

[1] Report of the Privileges Committee (New Zealand), "Question of privilege relating to the exercise of the privilege of freedom of speech by members in the context of court orders" (May, 2009)

2. Although a detailed chronology is set out below, the facts of the present case can be stated briefly as follows. The plaintiff, Mr. O'Brien, obtained an interlocutory injunction from the High Court on the 30th April, 2015, in order to protect certain banking information which he anticipated would be broadcast by RTÉ as part of a documentary concerning Irish Bank Resolution Corporation. Over the course of a number of dates subsequent to the granting of the injunction, two members of Dáil Éireann revealed most of the information the subject of the injunction by way of utterances on the floor of the House. As a consequence, the plaintiff was forced to concede on successive dates before the Court which had seisin of the injunction proceedings that the orders made had to be substantially varied, until a point was reached when almost nothing was left covered by the injunction. The plaintiff lodged written complaints relating to the utterances with the Dáil Committee on Procedure and Privileges. The Committee considered these complaints and ruled that the Deputies had not breached the relevant Dáil Standing Order. The Committee communicated this to the plaintiff by letter, although, in one instance, the plaintiff learned of the ruling by reading the Irish Times newspaper before he received any letter from the Committee.

3. These simple and stark facts give rise to the issues in this case, which concern the separation of powers as between the Oireachtas and the courts under the Irish Constitution. The plaintiff now seeks a number of declarations from this Court which would, in effect, condemn both the utterances of the Deputies and the rulings of the Committee. The plaintiff argues that the members overstepped their proper constitutional role and trespassed into the judicial domain when they revealed, on the floor of the House, private banking information which was the subject of an interlocutory injunction. The plaintiff argues that by doing so, the

Deputies upset the proper equilibrium established by the Constitution as between the Oireachtas and the courts, and that the Court should step in to restore this equilibrium. The defendants argue that, for the Court, that the matters in issue are non-justiciable and that to entertain the proceedings would itself constitute a breach of the separation of powers provided for under the Constitution. Thus, a distinctive feature of the case is that each side invokes the concept of the separation of powers as supporting its arguments.

4. Within the broad separation of powers issue, a number of distinct questions arise. Regarding the utterances made in the Dáil, these questions include the following. First, what is the relationship between sections 12 and 13 of Article 15 of the Constitution and how do they apply to the present case? What is the meaning of the term 'amenable' or 'inchúisithe' in Article 15, s.13 of the Constitution? Does the privilege in Article 15, s.12 apply to the utterances in this case and, if so, what is the scope of that privilege? What is the significance, if any, of the fact that the plaintiff has not sued the individual Deputies and has confined the reliefs sought to declaratory relief? If the entertaining of the present proceedings by the Court would *prima facie* breach the separation of powers, do the circumstances of the present case bring it into a category of exceptional cases referred to in some of the authorities, such that the Court might be permitted to step into what would normally be a zone of non-justiciability? With regard to the Committee's ruling, the question arises as to whether Article 15 ss. 12 and 13 have any relevance, or whether the examination of the issues should take place through the lens of Article 15, s.10 of the Constitution only. Also, having regard to authorities such as: *Re Haughey* [1971] I.R. 217; *Maguire v. Ardagh* [2002] 1 I.R. 385; *Callely v. Moylan* [2014] 4 I.R. 112; and *Kerins v. McGuinness and*

Ors, [2017] IEHC 34 (Kelly P., Noonan and Kennedy JJ.) do the proceedings of the Committee on Procedures and Privileges in the present case fall within or outside the zone of justiciability?

5. The plaintiff's case was presented in two distinct tranches. The first limb of the plaintiff's case concerned the utterances made by the Deputies on successive dates on the floor of the Dáil. Complaint was made not only about the utterances themselves, but also the manner in which the Ceann Comhairle or Leas Ceann Comhairle had failed to prevent them or seek to curb the members in making their utterances while they were speaking, even after correspondence had been sent on behalf of the plaintiff drawing attention to the court order and requesting that steps be taken to prevent a recurrence or further expansion. The second limb of the case concerned the plaintiff's complaint to the Committee of Procedures and Privileges and the manner in which it was dealt with by the Committee, including the Committee's conclusion that there was no breach of the Standing Order relating to the *sub judice* rule. The defendants raised a claim of non-justiciability in relation to both limbs of the plaintiff's case. I propose to deal with the case in the same sequence, namely to deal, in the first instance, with the utterances in the Dail, and secondly, with the Committee decision.

Relevant Provisions

6. Article 15, s. 10 of the Constitution provides:

> "Each House shall make its own rules and standing orders, with power to attach penalties for their infringement, and shall have power to ensure freedom of debate, to protect its official documents and the private papers of its members, and to protect itself and its members against any person or persons

interfering with, molesting or attempting to corrupt its members in the exercise of their duties."

7. Article 15, s. 12 provides: "All official reports and publications of the Oireachtas or of either House thereof and *utterances made in either House wherever published shall be privileged.*" (Emphasis added).

8. Article 15, s. 13 provides:

"The members of each House of the Oireachtas shall, except in case of treason as defined in this Constitution, felony or breach of the peace, be privileged from arrest in going to and returning from, and while within the precincts of, either House, and *shall not, in respect of any utterance in either House, be amenable to any court or any authority other than the House itself.*" (Emphasis added).

9. Article 34 of the Constitution provides, in relevant part:

"Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public."

10. Article 40, s. 3, subs. 2 provides:

"The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."

11. Order 57 of the Dáil Éireann Standing orders (the substance of which has now been transposed into Order 59 of the 2016 Standing Orders) relative to Public Business, applicable at the relevant time, provided:

"Subject always to the right of Dáil Éireann to legislate on any matter (and any guidelines which may be drawn up by the Committee on Procedure and Privileges from time to time), and unless otherwise precluded under Standing Orders, a member shall not be prevented from raising in the Dáil any matter of general public importance, even where court proceedings have been initiated:

Provided that -

(1) the matter raised shall be clearly related to public policy;

(2) a matter may not be raised where it relates to a case where notice has been served and which is to be heard before a jury or is then being heard before a jury;

(3) a matter shall not be raised in such an overt manner so that it appears to be an attempt by the Dáil to encroach on the functions of the Courts or a Judicial Tribunal;

(4) members may only raise matters in a substantive manner, that is by way of Parliamentary Question, debate on the adjournment and, Motion and so forth where due notice is required; and

(5) when permission to raise a matter has been granted, there will continue to be an onus on members to avoid, if at all possible, comment which might in effect prejudice the outcome of the proceedings."

Chronology of Events

12. The events which gave rise to the present proceedings took place over successive dates between April and July, 2015, and involve events in three different locations; (1) the High Court, (2) the floor of the Dáil, and (3) the Committee on Procedures and Privileges.

13. On the 30th April, 2015, the plaintiff was granted short service of a motion directed to RTÉ in which he sought an injunction restraining RTÉ from publishing any confidential documentation or information relating to, his personal banking arrangements with Irish Bank Resolution Corporation Limited (IBRC). That application was adjourned for hearing to the 12th May, 2015. The application received widespread publicity.

First Utterance by Deputy Catherine Murphy

14. On the 6th May, 2015, during a Dáil debate on a Private Members Motion on the sale by IBRC of Siteserv, which was purchased by a company owned or controlled by Mr. O'Brien, Deputy Catherine Murphy TD made certain utterances, which included a reference to the plaintiff by name in the context of the sale of Siteserv. She asserted certain facts in connection with loans he had with IBRC, namely that he was one of the largest debtors of IBRC, that his loans had expired, and that he had written to Kieran Wallace seeking to pay off his loans in his own time at low interest rates. The acting chairman on three occasions requested of Deputy Murphy not to use names.

15. The interlocutory injunction proceedings were heard before Binchy J. in the High Court from the 12th -15th May, 2015. At the hearing, counsel on behalf

of the plaintiff conceded that he could no longer seek relief from the court in respect of the particular matters that Deputy Murphy had already put into the public domain through her utterances in the Dáil on the 6th May, 2015. Accordingly, the order was varied to exclude from the injunction the matters Deputy Murphy had identified in the Dáil.

16. On the 20th May, 2015, the plaintiff wrote a letter of complaint to the Ceann Comhairle. He complained that she "persisted in making false and inaccurate statements to the Dáil about my personal banking arrangements based on confidential information which she knew to have been stolen". He said that he wished to record the fact that no Deputy should be permitted to deliberately abuse parliamentary privilege "particularly when the content of such abuse is inaccurate and is based on information or material that a Deputy knows to have been improperly obtained". He asked to be informed of what steps would be taken to ensure that "no deputy will be allowed to deliberately and knowingly breach the privilege afforded to them by virtue of the position they hold and their presence in the Dáil chamber". This correspondence was acknowledged on the 25th May, 2015, and the Ceann Comhairle advised that the matter was being referred to the Clerk of the Committee on Procedure and Privileges.

17. On the 21st May, 2015, in a decision which received widespread media attention, the High Court granted the plaintiff interlocutory injunctive relief. In his judgment, Binchy J. carefully analysed the arguments that had been made on behalf of RTÉ to the effect that the focus of the report was the governance of IBRC, which was a matter of public interest, and that this public interest outweighed the plaintiff's interest in the confidentiality of the business

relationship between him and the bank. RTÉ had also advanced the arguments that the plaintiff was a public figure who played a significant role in the State's business and public life, and that his rights to privacy and confidence were matters of legitimate public interest. Binchy J. conducted a detailed examination of relevant authorities, including those relating to Article 10 of the European Convention on Human Rights (freedom of expression), and privacy rights, both under Article 8 of the Convention and pursuant to the Irish Constitution. He concluded that the plaintiffs had satisfied the legal requirement of establishing a convincing case that they would succeed at the full trial of the matter, that on the evidence before him damages would not be an adequate remedy, and that the balance of convenience favoured the plaintiff's application for interlocutory injunctive relief.

18. On the 21st May, 2015, Deputy Murphy issued a statement on her website and on Twitter stating that

> "there is nothing I can say about the issues of the case because of the extremely wide-ranging injunction but what I can say is that there are very serious implications here for the freedom of the press and how we proceed on this matter is crucial for future reporting and democratic process in this country".

Second Utterance by Deputy Catherine Murphy

19. On the 27th May, 2015, during her contribution to a motion in Dáil Éireann on the disposal of shares in Aer Lingus, Deputy Murphy again referred to the plaintiff in the context of the proposed review into IBRC, and referred to the

fact that the liquidator, Kieran Wallace, had joined the plaintiff in his proceedings against RTÉ in respect of the confidentiality of the banking information.

Third Utterance by Deputy Catherine Murphy

20. On the 28th May, 2015, during a debate on the Comptroller and Auditor General (Amendment) Bill, 2015, in Dáil Éireann, Deputy Murphy again raised the issue of the review of the Siteserv sale to be carried out by the special liquidator and her view that he had an actual or perceived conflict of interest. She again complained that the scope of the proposed review was inadequate and referred to the plaintiff by name, making a further assertion that the former CEO of IBRC, Mike Aynsley, had made verbal agreements with the plaintiff to allow him to extend the terms of his already expired loans, and that the verbal agreement was never escalated to the credit committee for approval. She alleged that the plaintiff received extremely favourable interest terms. No intervention was made by the Ceann Comhairle at any time during her contribution. Deputy Murphy almost simultaneously published excerpts from her speech on Twitter over the course of 27 separate tweets.

21. Solicitors acting on behalf of the plaintiff wrote to the Ceann Comhairle on the 28th May, 2015. In this letter it was alleged that the Deputy

> "knowingly and gratuitously breached the terms of a High Court injunction dated 21 May 2015, granted by Mr. Justice Binchy in High Court proceedings entitled "*Denis O'Brien v. Radio Teilifis Éireann…* by revealing details of our Client's personal private and confidential banking arrangements with IBRC".

The letter also said that "in our view this breach is a gross abuse of Dáil privilege and is deliberately designed to frustrate the Order of the High Court and to usurp the role of the Court." The letter lodged a formal complaint and requested immediate steps to be taken to prevent Deputy Murphy "from further using the Dáil Chamber to knowingly and gratuitously breach the terms of the High Court Order."

22. By letter of the 29th May, 2015, William Fry wrote again to the Ceann Comhairle and the Leas-Cheann Comhairle, again alleging that there had been a breach of the court order and "a deliberate and manifest abuse of Dáil privilege", and that it was "a calculated device aimed at frustrating the Order of the High Court and to usurp the role of the Courts."

23. On the 2nd June, 2015, counsel on behalf of the plaintiff conceded before the High Court that the terms of the injunction no longer applied to the additional private and confidential informatio the subject of the most recent Dáil utterances, and the Court accordingly varied the order of the 21st May, 2015, so as to exclude the content of the disclosures made by Deputy Murphy on the 27th and the 28th May, 2015.

Utterances of Deputies Doherty and Murphy on the 9th June, 2015

24. On the 9th June, 2015, during a Dáil speech on the Draft Commission of Investigation (Certain Matters Concerning Transactions Entered into by IBRC) Order, 2015, Deputy Pearse Doherty made certain utterances in Dáil Éireann concerning IBRC and Siteserv. He referred to a series of documents which had come into his possession in recent days. He said that the documents showed a number of things in relation to the plaintiff's loan repayment arrangements with

IBRC, which he then proceeded to particularise with reference to specific documents. His utterances described particular written proposals for loan repayment arrangements, discussions with the Bank, and the ultimate result of these discussions.

25.

26. During the same debate, Deputy Catherine Murphy said, *inter alia*:

> "Twelve days ago I made a speech in the House which, apparently, rattled a few cages. I do not regret making the speech but I regret the fact that I felt I had no choice but to make it. The review that had been established was not fit for purpose. The Bill I was introducing sought to extend the role of the Comptroller and Auditor General to include IBRC in its terms of reference so that office could do the review. What I was looking for was an independent investigation and I am pleased we are getting to the point where we are going to get that, albeit in a different way."

Deputy Murphy went on to refer to the importance of freedom of speech and referred to various proceedings brought by the plaintiff which, she said, were intended to exert a chilling effect on free speech. Again, on this date, no intervention was made by the Ceann Comhairle at any time during these contributions.

27. On the 10th June, 2015, the Committee on Procedures and Privileges met to consider the plaintiff's complaint regarding the utterances of Deputy Murphy on the 6th, 27th and 28th May, 2015, and concluded that Deputy Murphy had not abused parliamentary privilege.

28. On the same date, the 10th June, 2015, counsel on behalf of the plaintiff conceded before the High Court that the terms of the injunction no longer applied to the private and confidential information the subject of those utterances and on foot of that application the court granted an order varying the terms of the order of the 21st May, 2015, so as to exclude the content of the disclosures made by Deputy Doherty in the Dáil on the 9th June, 2015.

29. On the 11th June, 2015, the plaintiff learned from a report in the online edition of the Irish Times newspaper that his complaints in respect of Deputy Murphy's utterances on the 27th and 28th May, 2015, had been rejected by the Committee on Procedures and Privileges. At this stage, he had received no communication from the Committee.

30. On the 15th June, 2015, William Fry wrote a comprehensive letter to the Ceann Comhairle complaining (1) that William Fry had learned of the alleged rejection of its complaint against Deputy Murphy via an article in the Irish Times newspaper on the 11th June, 2015, despite the fact that no substantive response had issued to William Fry's earlier correspondence and (2) setting out the substance of the plaintiff's complaint.

Response from Committee on Procedures and Privileges

31. By letter dated the 15th June, 2015, the Clerk to the Committee on Procedure and Privileges wrote in response to William Fry's letters to advise that the Committee had found that Deputy Murphy had not breached Standing Oder 57(3). The letter contained the following:

"Having carefully considered your correspondence in detail, reviewed the relevant transcripts and taken detailed procedural and legal advice in respect of same, the Committee found as follows:

(1) Deputy Catherine Murphy did not make any utterance in the nature of being defamatory, within the meaning of the Dáil Standing Orders relative to Public Business in respect of your client and therefore, she did not abuse Dáil privilege. The Committee therefore cannot accept the assertions in your letter;

(2) Deputy Catherine Murphy's contributions were a justifiable expression of free speech by a parliamentarian;

(3) Deputy Catherine Murphy did not breach Standing Order 57(3) (the Sub Judice rule) as her utterances were made on the floor of the House, in a responsible manner, in good faith and as part of the legislative process; and

(4) In relation to your allegation that Deputy Murphy breached the terms of the High Court injunction, as you may be aware, any such finding is solely and exclusively a matter for the Courts and the Committee on Procedure and Privileges therefore cannot lawfully make a determination in relation to it."

32. By letter dated the 15th June, 2015, the Clerk to the Committee also wrote directly to the Plaintiff to advise that the Committee had concluded that Deputy Murphy did not abuse parliamentary privilege and referred to the above letter issued to William Fry.

33. On the 17th June, 2015, the Court varied the Order of the 21st May, 2015, so as not to restrain publication of the statement of Mike Aynsley of the 28th May, 2015, and parts of the RTÉ script exhibited on behalf of RTE during the

proceedings, but refused RTÉ's application for discharge of the interlocutory injunction in its entirety.

34. The Plaintiff issued and delivered a Plenary Summons on the 16th June 2015 to the Houses of the Oireachtas Commission, Ireland, and the Attorney General. A Statement of Claim was delivered on the 25th June 2015. Subsequently the plaintiff was granted an order to strike out the Houses of the Oireachtas Commission as a defendant and substituting "Clerk of Dáil Éireann, Sean Barrett, Joe Carey, John Halligan, Martin Heydon, Paul Kehoe, John Lyons, Dinny McGinley, Sean O Fearghail, Aengus O'Snodaigh and Emmet Stagg (members of the Committee on Procedure and Privileges of Dáil Éireann)." Deputies Murphy and Doherty, who made the utterances complained of, were not joined individually to the proceedings at any point.

35. On the 1st July, 2015, the Committee on Procedures and Privileges met to consider the utterances of Deputy Doherty. On the 3rd July, 2015, the Clerk of the Committee wrote to William Fry advising that the Committee had determined that the utterances of Deputy Doherty on the 9th June, 2015, in the Dáil did not contravene Standing Order 57, having regard to the terms and context of the utterances. The letter contained the following:

> "From reviewing the terms and context of Deputy Doherty's contribution, the Committee concluded that it was made in the course of a proposal being debated in a House of the legislature as a statutory prerequisite to the Government's adopting secondary legislation, namely an Order pursuant to s. 3 of the Commissions of Investigation Act 2004. That provision and the proposed Terms of Reference were predicated on the Government's believing

the Commission to be necessary arising out of matters of significant public concern. Deputy Doherty's contribution remained at all times pertinent to the matter in hand and the perceived public concerns that gave rise to it. The Committee concluded that the Deputy's exercise of his constitutional freedom of speech in Dáil Éireann fell outside the scope of, and did not contravene, Standing Order 57 by which Standing Order, among others, the internal workings of the House with regard to debate are regulated.

The Committee respectfully notes that by dint of the separation of powers, it would be quite inappropriate for a House of the Oireachtas or any of its Committees to consider whether a member's conduct could, were it not for the parliamentary privilege, have properly occasioned court proceedings for unlawfully frustrating a Court Order.

The Committee rejects your assertion that Deputy Doherty's contribution intervened in or determined your client's proceedings. Your client has had professional legal advice available to him with regard to the bounds of the causes of action he invoked against RTÉ. The strategy to be deployed by him from time to time in those proceedings, and any concessions made by him in them, were and are entirely matters for him to adopt in conjunction with his legal advisers."

The Pleadings

36. It has been noted above that there was a substitution of different defendants to the proceedings after the initial stages of the case. At the time of the hearing, the defendants were the Clerk of Dáil Éireann (the first named defendant), the members of the Committee on Procedure and Privileges of Dáil

Éireann (the second to eleventh named defendants), Ireland and the Attorney General (the twelfth and thirteenth defendants). Deputies Murphy and Doherty were never named as individual defendants. Insofar as the first defendant represents all deputies in the Dáil, as he was joined 'in a representative capacity as representing the members of Dáil Éireann', the two Deputies are represented in the proceedings indirectly by him.

37. The Statement of Claim went through a number of different versions but it can be said that the reliefs sought, as formulated in the Second Amended Statement of Claim, were as follows:

> "a. A Declaration that the effect of Article 6 and of Articles 34-37 inclusive of the Constitution is to vest in the Courts the exclusive right to determine the justiciable controversy arising in the proceedings entitled Denis O'Brien –v- Raidió Teilifís Éireann, Record no. 2015/3350P.
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> b. A Declaration that the substantial effect of various utterances made by Dáil Deputies under privilege in Dáil Éireann on the 6th, 27th and 28th May 2015 and 9th June 2015 was to determine in whole or in large part the justiciable controversy then pending before the Courts in the proceedings entitled Denis O'Brien –v- Raidió Teilifís Éireann, Record No. 2015/3350P.
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> c. A Declaration that, by causing and permitting the said utterances to be made, and by failing to enforce the provisions of Standing Order 57, the Defendants are guilty of an unwarranted interference with the operation of the Courts in a purely judicial domain.

d. A Declaration that, in causing and permitting the said utterances to be made, the Defendants have caused or permitted a breach of the Plaintiff's rights pursuant to Article 40.3.1 of the Constitution.

e. A Declaration that the finding of the Committee on Procedure and Privileges of Dáil Éireann of 15 June 2015 was:

i. based on an erroneous interpretation of Standing Order 57; and/or

ii. made without any evidence to support the finding that Deputy Murphy had acted in a responsible manner and in good faith; and/or

iii. in breach of the Plainitff's right to fair procedures.

f. A Declaration that the finding of the Committee on Procedure and Privileges of Dáil Éireann of 1 July 2015 was:

i. based on an erroneous interpretation of Standing Order 57;

ii. and/or in breach of the Plaintiff's right to fair procedures.

g. Such further or other Order as to this Honourable Court shall seem fit.

h. An Order providing for the costs of these proceedings."

The evidence of the plaintiff

38. The plaintiff gave evidence during the hearing before the Court and the following gives a flavour of his evidence. He said that he believed that banker/customer confidentiality was important not only for himself, but also for the country as a whole. He stated that he thought it would be an extraordinary situation if every citizen in the State was subject to having their banking details

exposed in the Dáil, and that it was important that court orders should be obeyed and not undone by a political process. He stated that he thought it would be bad for Ireland, internationally, if it were known that this was a place where matters the subject of a court order could be 'unravelled' by Dáil deputies and that it would be a matter that potential investors would take into account. He also referred to personal threats he had received following the publication of his banking details, which were reported to an Garda Síochána, although he was not in a position to say definitively that there was a causal link between the publication and the threats. In cross-examination, he said that one of the things he wanted when writing to the Ceann Comhairle was for the latter to take a more proactive role in intervening in the debate. He stated that his purpose in bringing the present proceedings was to ensure that the Court would see to it that its orders were respected by Dáil deputies. At one point he said:

> "I would like to know if a citizen goes in to protect their privacy and to protect private banking matters and the High Court rules and said, you cannot cover that, RTÉ, or any other media outlet, that that would hold and that would be absolutely watertight. And instead, we have a situation where that subsequently became completely porous because of the actions of members of the Oireachtas."

He accepted that one of the purposes of his proceedings was to have judicial condemnation of the Deputies for the utterances they made in the Dáil. Interestingly, when asked whether, if the Committee had issued a reproof or rebuke to the Deputies, he would still have brought the present legal proceedings,

he answered in the affirmative. He accepted that the effect of his obtaining the relief sought would be to greatly restrict Dáil speech, although he added:

> "I think, Mr. Collins, you are trying to make victims out of the two Dáil deputies here. Because if you look at my situation, I'm the one that is being wronged here, my personal banking details were stolen, they were given to a Dáil deputy and then a Dáil deputy, two of them, started releasing information, on a piecemeal basis, right in the middle of a court process."

He was asked whether he would consider suing the Deputies personally if the present proceedings "cleared a path" to that, and he said that it was "unlikely."

The first limb of the plaintiff's case: the utterances in the chamber of the Dáil

39. With regard to the first limb of the case, concerning the utterances on the floor of the Dáil, the reliefs sought by the plaintiff (at the conclusion of the hearing, as distinct from that outlined in the Amended Statement of Claim) were, in substance, as follows: (a) A declaration that the substantial effect of the utterances in the Dáil was to determine in whole or in large part the justiciable controversy then pending before the Courts; (b) A declaration that by causing or permitting the utterances to be made and by failing to enforce Standing Order 57, the defendants were guilty of an unwarranted interference with the operation of the courts in a purely judicial domain; and (c) A declaration that in causing and permitting the said utterances to be made the defendants have caused or permitted a breach of the plaintiff's rights pursuant to Article 40, s. 3, subs. 1 of the Constitution.

The submissions of the parties on the first limb of the case

40. I hope I will not do any injustice to the lengthy and nuanced submission made on the behalf of the parties by presenting an outline of them in the following terms. The plaintiff argued that the actions of the Deputies, in using the opportunity presented by freedom of speech on the floor of the House to reveal information which was the subject of a court order protecting its confidentiality, engaged in an attack upon the administration of justice which is the exclusive function of the Courts under Article 34 of the Constitution. It may be noted that the plaintiff did not seek to advance this limb of the case on the basis of his personal right of access to the courts, but rather on the basis of the constitutional 'imperative' that justice be administered in the courts and the separation of powers. The alleged attack upon the administration of justice was characterised in a number of different ways throughout the case. In the Statement of Claim, it was alleged at one point "that the substantial effect of various utterances….was to *determine* in whole or in large part the justiciable controversy then pending before the Courts"; while at another, it was alleged that the Deputies were "guilty of an unwarranted interference with the operation of the courts in a purely judicial domain." In the written submissions on behalf of the plaintiff, there were references to an "interference with proceedings before the High Court", "negating an order of the Court", "depriving a Court order of effect", and it was again suggested that "the utterances *determined* in whole or in part the justiciability controversy which was before the High Court"; and that the effect of the utterances was to "bleed the order…of effect". It was also suggested at paragraph 9 of the written submissions, that the utterances constituted a breach of the court order, as had also been alleged in some of the correspondence on behalf of the plaintiff to the Ceann Comhairle. However, this suggestion that the utterances of

the Deputies were in direct breach of the court order was not pursued at the hearing. The reference to the utterances 'determining' the court proceedings was no doubt a use of language seeking to invoke the *Buckley & Ors. v The Attorney General & Anor.* [1950] 1 I.R. 67 line of authority, which will be discussed below.

41. The defendants raised the issue of justiciability, arguing that the Court had no role or entitlement under Article 15 of the Constitution, having regard in particular to Article 15.s.12 and Article 15.s.13, to engage in any examination or consideration of utterances made in the Dáil. The plaintiff responded with two arguments. First, it was argued that Article 15, s. 13 was the only relevant section and that the term 'amenable' or 'inchúisithe' in Article 15, s. 13 did not refer to the type of proceeding before the Court. In particular, reliance was placed upon the fact that the proceedings had not been brought against the two individual Deputies, but rather the Clerk of Dáil Éireann and the members of the Committee which had ruled upon the plaintiff's complaints about the utterances. Further, emphasis was placed on the form of relief sought, namely the declarations described above. It was argued that these features of the proceedings lacked the features necessary to constitute a rendering of the Deputies 'amenable' to the courts. Secondly, it was argued on behalf of the plaintiff that, even if the proceedings before the Court could be seen as rendering the Deputies 'amenable' within the meaning of Article 15, s. 13, the Court was entitled to use a power, exceptionally, to intervene where there had been a violation of the separation of powers in the form of a deliberate and conscious decision to flout a court order under cover of parliamentary privilege. This power, it was argued, had been identified in cases such as: *Slattery & Ors. v An Taoiseach & Ors* [1993] 1 I.R.

286; *O'Malley v An Ceann Cómhairle & Ors* [1997] 1 I.R. 427; *Curtin v Dáil Éireann & Ors* [2006] 2 I.R. 556; *T.D. & Ors. v The Minister for Education & Ors.* [2001] 4 I.R. 259; and *Callely v. Moylan* [2014] 4 I.R. 112.

Relevant Irish Authorities

42. There are a number of Irish authorities in which issues relevant to the separation of powers, and, more particularly, the relationship between the administration of justice in the courts and the legislative function and freedom of speech in the Oireachtas, have been explored. One group of authorities concerns the extent to which the courts are permitted to interfere with the Oireachtas in its law-making role, including: *Buckley & Ors. v The Attorney General & Anor.* [1950] 1 I.R. 67; *Wireless Dealer Association v. Minister for Industry and Commerce* (Unreported, Supreme Court, 14th March, 1956)*; Finn v The Attorney General & Ors.* [1983] 1 I.R. 154; *Slattery & Ors. v An Taoiseach & Ors* [1993] 1 I.R. 286. Another group of cases discussing the immunities and privileges in Article 15, ss. 12 and 13 and questions of justiciability in relation to inquiries or proceedings conducted by Tribunals of Inquiry or Oireachtas Committees under Article 15, s. 10 solely or in conjunction with legislation. These include: *The Attorney General v. Hamilton* [1993] 2 I.R. 250 ("*Hamilton (No.1)*; *The Attorney General v. Hamilton (No. 2)* [1993] 3 I.R. 227 ("*Hamilton (No.2)*; *O'Malley v An Ceann Cómhairle & Ors* [1997] 1 I.R. 427; *Howlin v Morris* [2006] 2 I.R. 321; *Ahern v. Mahon* [2008] 4 I.R. 704; *Callely v. Moylan* [2014] 4 I.R. 112; and *Kerins v. McGuinness and Ors*, [2017] IEHC 34 (Kelly P., Noonan and Kennedy JJ.). In none of these authorities were the courts presented with anything similar to the facts arising in the present case, but the discussions

of the relationship between the courts and the Oireachtas in those cases are nonetheless of considerable assistance.

43. I was also referred to some authorities from other common law jurisdictions, which of course have to be considered with considerable care because of potential differences between their own legal contexts and the specific Irish constitutional provisions. Reference was also made to some decisions of the European Court of Human Rights concerning the interaction between parliamentary utterances and personal rights under the European Convention on Human Rights, including *A v. United Kingdom* (2003) 36 E.H.R.R. 51. I will deal with the non-Irish authorities relatively briefly later in this judgment, but there can be no doubt that previous Irish authority on the relationship between the courts and the Oireachtas and the interpretation of Articles 34 and 15 of the Constitution have the most immediate and direct weight in the present context.

Was there "a determination" of issues by the Deputies?

44. I turn in the first instance to the Irish cases dealing with the separation of powers as between the courts and the Oireachtas in its law-making function. The plaintiff placed considerable emphasis upon *Buckley & Ors. v The Attorney General & Anor.* [1950] 1 I.R. 67. In that case, an issue arose as to the validity of legislation, namely the Sinn Féin Funds Act, 1947, which had been enacted in connection with a case which was pending before the courts. The case concerned a sum of money held on trust in the High Court since 1924 as a result of differences which had arisen within the Sinn Féin organisation. The plaintiffs had brought an action against the Attorney General and the personal representative of the last-surviving trustee claiming a declaration that the sum of

money was the property of the organisation and further seeking an order directing that payment be made to them or two treasurers of the funds then in Court. Defences were filed on behalf of the respective defendants. While the action was pending in the High Court, the Sinn Féin Funds Act was passed by the Oireachtas. By s. 10 of the said Act it was provided, *inter alia,* that all further proceedings in the action should be stayed, and that the High Court, if application were made *ex parte* on behalf of the Attorney General, should make an order dismissing the action, and should also direct that the said funds should be disposed of in the manner specifically laid down by the Act. Thus, it may be noted, the legislation actually purported to direct the High Court what specific orders to make in the proceedings before it.

45. On the Attorney General's application *ex parte* to the High Court in accordance with s. 10, the High Court (Gavan Duffy P.) refused the application on the ground that the Court could not comply with the provisions of the Act without abdicating its proper jurisdiction in a case before it. He said that he was being asked to make a summary order instead of giving a judicial decision in the matter and, in the course of his judgment, stated that:

> "I assume the Sinn Féin Funds Act, 1947, under which this application is made, to have been passed by the Legislature for excellent reasons, and, as a matter of course, I give to the Oireachtas all the respect due to the legislative assembly of the nation; but I cannot lose sight of the constitutional separation of powers. This Court cannot, in deference to an Act of the Oireachtas, abdicate its proper jurisdiction to administer justice in a cause whereof it is duly seized. This Court is established to administer justice and therefore it

cannot dismiss the pending action without hearing the plaintiffs; it can no more dispose of the action in that arbitrary manner at the instance of the Attorney General than it could give judgment for the plaintiffs without hearing the Attorney General against their claim. Moreover, this action is not stayed unless and until it is stayed by a judicial order of the High Court of Justice; the payment out of the funds in Court requires a judicial order of this Court, and under the Constitution no other organ of State is competent to determine how the High Court of Justice shall dispose of the issues raised by the pleadings in this action."

46. On appeal to the Supreme Court, towards the end of his judgment, O'Byrne J. said:

"There is another ground on which, in our view, the Act contravenes the Constitution. We have already referred to the distribution of powers effected by Art. 6. The effect of that article and of Arts. 34 to 37, inclusive, is to vest in the Courts the exclusive right to determine justiciable controversies between citizens or between a citizen or citizens, as the case may be, and the State. In bringing these proceedings the plaintiffs were exercising a constitutional right and they were, and are, entitled to have the matter in dispute determined by the judicial organ of the State. The substantial effect of the Act is that the dispute is determined by the Oireachtas and the Court is required and directed by the Oireachtas to dismiss the plaintiffs' claim without any hearing and without forming any opinion as to the rights of the respective parties to the dispute. In our opinion this is clearly repugnant to the provisions of the Constitution, as

being an unwarrantable interference by the Oireachtas with the operations of the Courts in a purely judicial domain."

47. The *Buckley* case is a leading authority on the principle that the Oireachtas may not enact legislation which directly interferes with the function of administering justice entrusted to the courts under the Constitution. As noted, in the *Buckley* case itself, the impugned legislation purported to direct the Court as to what conclusion ought to be reached in the case before it. This was a legislative interference of a most direct kind with the administration of justice. Subsequent cases have concerned legislation which sought to interfere with the administration of justice in a more indirect way. For example, in the case of *Maher v The Attorney General & Anor.* [1973] 1 I.R. 140, legislation was held to be invalid insofar as it provided that a certificate stating certain matters relating to the alcohol content in a blood or urine sample in a road traffic case was "conclusive evidence". In *McEldowney v Kelleher & Anor.* [1983] I.R. 289, the Supreme Court held that s13(4) of the Street and House to House Collections Act, 1962, was unconstitutional in circumstances where it mandated that a District Judge should disallow an appeal from a permit refusal if a member of An Garda Síochána stated on oath that he had reasonable grounds for believing that money raised by the collection would be used for an unlawful purpose. In *Cashman v District Justice Clifford & Anor.* [1989] 1 I.R. 121, the High Court (Barron J.)held that s13(5)(a) of the Betting Act, 1931, was an unconstitutional infringement of judicial power as it provided that on an appeal from a refusal to grant a licence under that Act, only the appellant, the Garda and the Revenue Commissioners could be heard in evidence. The Oireachtas was not permitted to limit the range of persons who could give evidence to the Courts.

48. It is therefore clear that the courts, in policing the boundary between the functions of the courts and the Oireachtas, have been careful to ensure that legislation does not directly or indirectly interfere with core elements of the administration of justice, such as weighing evidence and reaching conclusions upon the law and evidence. The courts have also been careful to avoid stepping outside of the boundaries of their own constitutional role into a role exclusively reserved for the Oireachtas. For that reason, the courts have consistently refused to rule on the constitutionality of Bills, whether pending before the Oireachtas or having been passed by it, on the basis that were they to do so other than under the Article 26 procedure, the courts would be trespassing into the law-making function which is exclusively reserved for the Oireachtas: *Wireless Dealer Association v. Minister for Industry and Commerce* (Unreported, Supreme Court, 14th March, 1956;, which concerned a Bill: *Finn v The Attorney General & Ors.* [1983] 1 I.R. 154, which concerned the Eighth Amendment of the Constitution Bill, 1982; and *Slattery & Ors. v An Taoiseach & Ors* [1993] 1 I.R. 286, concerning the Maastricht Treaty, where the Court held that it had no power to interfere, by means of the injunction remedy or otherwise, in the operation of the legislative and constitutional processes authorised by the Constitution.

49. I pause to note that a reference to the exercise of an exceptional jurisdiction was made by McCarthy J. in the course of his judgment in *Slattery & Ors. v An Taoiseach & Ors*. when he stated: -

> "The plaintiffs sought the intervention of the courts, the judicial organ of government, to arrest this constitutional procedure, involving both the

legislative and executive organs of government, and, further, involving the source of all powers of government, the People. *It may be that circumstances could arise in which the judicial organ of government would properly intervene in this process; such is not the case here.* In my judgment, the application made by the plaintiffs has no foundation whatever; to grant an order such as sought would be a wholly unwarranted and unwarrantable intervention by the judiciary in what is clearly a legislative and popular domain—see *Finn v. Attorney General and others* [1983] I.R. 154. As the courts are jealous of their constitutional role and will repel any attempt by legislature or executive to interfere in the judicial domain, so must the courts be jealous of what lies wholly within the domain of the legislature, the executive, and the People - jealous to ensure that the courts do not intervene in the constitutional process I have outlined." (Emphasis added).

50. The italicised words in the above passage suggest that, in exceptional circumstances, a situation might arise where the courts would have to intervene, even in the pre-legislative phase. No description was given of the type of situation that might give rise to the use of this exceptional jurisdiction, and none has arisen to date. The plaintiff draws attention to this potential residual jurisdiction, arguing that it permits the courts in exceptional cases to enter what would otherwise be a zone of non-justiciability. I will return to this issue later in the judgment.

51. I should also mention at this point the case of *Brennan v Minister for Justice* [1995] 1 I.R. 612, relied on by the plaintiff. This was the case in which it was held by the High Court that the power of the Minister to commute or remit

(in this case, to remit fines) was a power which should only be exercised in the most exceptional of circumstances, and that the manner in which it was being used on a widespread basis to reduce or quash fines was, in effect, the administration of a system of justice parallel or alternative to that under Article 34. It was argued that the similarity to the present case was that the Deputies had arrogated to themselves the function of administering justice which was properly the courts' domain. However, it does not seem to me that such generalised comparisons can be made. The power of the Minister to commute or remit, traced back through s. 23 of the Criminal Justice Act, 1951, to Article 13, s. 16 of the Constitution, is a power conferred on the Executive by the Constitution, but there is no language in Article 13, s. 6 suggesting an ouster of jurisdiction or immunity of the Executive from judicial review in respect of the exercise of this power, unlike the provisions of Article 15, ss. 12 and 13. The freedom to make utterances in the Oireachtas is not merely conferred on deputies by Article 15 but also *immunised* from review, and therefore a direct comparison with the power conferred by Article 13, s. 16 does not hold good. Further, the actual power in Article 13, s. 6 is intimately connected by its nature with the administration of justice, since it is a power exercised in relation to a sentence imposed by a court. Thus, it makes sense that a careful balance has to be struck as between the role of the court and the role of the Executive, and there is nothing in the Constitution that suggests that the courts are not entitled to patrol that particular boundary.

52. Having regard to the above authorities relating to certain types of interference with the administration of justice, I am not persuaded by the plaintiff's argument that the utterances of Deputy Murphy and Deputy Doherty in effect 'determined' the High Court injunction proceedings. What seems to me to

be specifically prohibited by the *Buckley* line of reasoning is a 'determination' in the sense of a removal by the Oireachtas by means of legislation from the courts of the power to make a judicial decision on a justiciable controversy, whether by legislation directing the court to reach a particular outcome (as in *Buckley* itself), by legislation directing the court how to treat a piece of evidence (*Maher v The Attorney General & Anor.* [1973] 1 I.R. 140;, *McEldowney v Kelleher & Anor.* [1983] I.R. 289*),* or by restricting the range of witnesses from whom it may hear (*Cashman v District Justice Clifford & Anor.* [1989] 1 I.R. 121). This is not in my view the same as an individual deputy making an utterance which thereby renders the justiciable controversy before the courts moot. On the facts of the present case, the actions of the Deputies did not purport to direct the courts how the determine the proceedings; rather what happened was that they released the information sought to be protected by the courts into the public domain, thereby rendering the judicial proceedings moot. Therefore, I do not think that this case falls within the parameters of the *Buckley* principle nor do I think that the grounds for the first declaration sought would be made out, even if the issue of justiciability were laid to one side. However, that does not by any means dispose of the issues under the first limb of the plaintiff's case. The use of parliamentary speech which rendered moot a confidentiality action before the Court is itself a significant action which had a substantial effect on the judicial proceedings. The issue remains as to whether there was an 'interference' with the administration of justice and whether the courts have jurisdiction to entertain proceedings concerning the utterances. This squarely raises the issue of justiciability. In this regard, it is necessary to examine the leading Irish authorities in which the

provisions of Article 15, ss. 12 and 13 of the Constitution, and the precise scope of the immunities and privileges contained therein, were examined or referred to.

The applicability and scope of Articles 15, ss. 12 and 13

53. I turn now to whether, even accepting that the utterances had a significant impact or effect upon the court proceedings, the Court has jurisdiction to entertain any review of such utterances. As regards the authorities relating to aspects of Article 15, there was a significant dispute between the plaintiff and the defendants on matters such as (1) whether Article 15, s. 12 applied to the present situation at all; and (2) the scope of the immunity within each of the provisions and, in particular, the concept of 'amenability' in Article 15 s. 13.

54. One of the leading cases on the scope of the privileges and immunities in Article 15 is *Hamilton (No.2 [1993] 3 IR 227).* In this case, the main issue was whether and to what extent, having regard to Article 15 of the Constitution, a member of the Oireachtas could be questioned about the sources of information set out, in the first instance, in utterances before the Dáil, and secondly, in a statement made to a Tribunal of Inquiry to the same effect. The High Court (Geoghegan J.) held that Article 15 of the Constitution did not protect a member or former member of a House of the Oireachtas from cross-examination in respect of utterances made outside the precincts of either House and, in particular, did not protect matters contained in the statements submitted to the Tribunal by such member or former member. He also held, refusing all other reliefs sought, that a member of the Oireachtas could not be obliged to give evidence to any tribunal in relation to any utterance made by him before the Oireachtas, nor could such member be obliged to disclose the source of the information upon which

such utterance before the Oireachtas was based. A majority of the Supreme Court allowed the appeal, holding that Article 15, s. 13 operated to prevent the Tribunal from questioning the Deputies about the sources of information they had put before the Dáil. A number of aspects of the privileges and immunities in Article 15 ss12 and 13 were discussed in the judgments and, because the parties dispute the proper interpretation to be placed upon them, I think it is necessary to set particular passages out in full.

55. In the course of the High Court judgment in that case, Geoghegan J. engaged in a detailed review of the origin and purpose of Article 15, ss. 12 and 13, examining, *inter alia*, the differences in wording between those sections and Articles 18 and 19 of the Constitution of Saorstat Éireann; the relationship between Article 15 of the Constitution and Article 9 of the Bill of Rights 1689; the wording of the United States 'speech and debate' clause; and a large number of common law authorities from England and the United States. He also examined a report of an Australian Royal Commission as well as a number of Australian decisions. It may be noted that he referred at an early stage of his judgment (at pages 237-8) to *Ex parte Wason* (1868) L.R. 4 QB 573, stating that he had deliberately selected this case as his starting point "because of the use of the word amenable in two of the judgments". On this he stated "I think that the word in that case at least is being used in one of the senses argued for before me, that is to say, liable to enforcement procedures or sanctions or penalties." He also referred in the course of his review to the Australian case of *R v Murphy* (1986) 64 ALR 498 and stated that certain passages of the judgment of Hunt J. therein "gets to the heart of what is meant by amenability in Article 15., s.13 of the Constitution" namely "only where legal consequences are to be visited upon

members of Parliament or witnesses for what was said or done by them in Parliament that they can be prevented by challenges in the courts of law from exercising their freedom of speech in Parliament."

56. At the conclusion of his extensive review, Geoghegan J. went on to say at page 247:-

> "While many of the cases which I have reviewed long postdate the drafting of the 1922 Constitution, the decisions in them are for the most part firmly based on art. 9 of the Bill of Rights, 1689, and/or the speech or debate clause in the U.S. Constitution which itself derived from the Bill of Rights and from the older cases interpreting them. While there might have been some doubts as to the detailed application of the principles, it would seem likely to me that the framers of the Constitution of Saorstat Éireann, 1922, would have broadly understood that parliamentary privilege in both England and the USA, being the two major common law jurisdictions at the time, involved the absolute non-amenability of members of Parliament to courts or other tribunals in respect of utterances made in Parliament. I think therefore that articles 18 and 19 of the 1922 Constitution and therefore ss. 13 and 12 of Article 15 of the Constitution must be read in that context.
>
> But that opinion requires some qualification. Although it is, in my view, self-evidently supported by the respective English texts of the two Constitutions, there is difficulty arising from the Irish texts. The expression "inchúisithe" in the Irish text of Article 15, s. 13 and on which Mr. Gallagher places such reliance is absent from the equivalent Irish text in the 1922 Constitution. Assuming that the English text of that Constitution was the official text, it

must be admitted that the Irish word used for "amenable" is different. But I think I am entitled to and indeed am bound to have regard to the near identical English text in considering the true interpretation of Article 15, s. 13 unless in doing so a conflict arises with the Irish language text. I accept of course that in that event the Irish text must prevail under the provisions of Article 25, s. 5, ss. 4 of the Constitution. However, I do not think that there is such a conflict. I accept that the word "inchúisithe" connotes something like “chargeable". Indeed the Irish Legal Terms Order (No. 2), 1948 (S.I. No. 42 of 1948) is of some interest in this context. Included among the list of Irish translations for legal expressions are the following:

I accuse - Cúisím

Accusation - Cúiseamh

Accused - Cúisí

Accused - Cúisithe

I charge (with a crime *etc* .) - Cúisím

Charge (*i.e.* criminal) - Cúiseamh

I do not think however that the expression is necessarily confined to a criminal context. It seems clear that when used in the Constitution it is not so confined having regard to the wide scope of the expression “any court or any authority other than the House itself". *But the word probably does connote the rendering of a person to some liability or sanction or potential liability or sanction*. If upon a refusal at a tribunal established under the Tribunals of Inquiry (Evidence) Act, 1921, to answer a question certain legal consequences can flow adverse to the person so refusing as indeed would be the case, it

follows, in my view, that a member of the Dáil questioned about utterances made by him in the Dáil cannot be made subject to those legal consequences. In the context of a tribunal that is what is meant by "inchúisithe" and that is what is meant by "amenable". As I have already indicated, therefore, I do not believe that there is any conflict between the English and Irish versions. Accordingly, the absolute privilege and non-amenability inserted into the Constitution of Saorstat Éireann in the context of the historical development of British and American parliamentary privilege was simply re-inserted with slight alterations into the present Constitution, Bunreacht na hÉireann." (Emphasis added).

57. It is strongly urged on behalf of the plaintiff in the present case that the reference in the above passage to the "*rendering of a person to some liability or-sanction or potential liability or sanction"* indicates an interpretation of amenability which would not preclude the Court from considering the present proceedings to be justiciable, as neither Deputy Murphy nor Deputy Doherty have been brought before the Court, nor are they facing any liability or potential liability or sanction.

58. Geoghegan J. went on at pages 248-249, to quote from the judgment of O'Flaherty J. in *Hamilton (No.1)*, a passage which refers both to 'disciplining a member' and asking a member to 'explain his utterances':

"In this regard it is relevant to note the absolute immunity conferred on members of each House of the Oireachtas by Article 15, s. 13 which provides that the members 'shall not, in respect of any utterance in either House, be amenable to any court or any authority other than the House itself'. That

means, I think, that *a Tribunal such as this, though it has great powers is still an agent of both Houses for a specific task and is not in the position and has not the powers to discipline a member, which is possessed by each House. So, if a Dáil Deputy is summoned before this Tribunal to explain utterances made by him in the House he is no more amenable to it than he is to any court. Not only can he not be disciplined; he cannot be made to explain his utterances*. *He could not be made answerable to any court for his utterances in the House even if he had been guilty of the grossest contempt of court. He could affect the most serious criminal trial but could not be attached for contempt of court in respect of something said in the House*. That is unlikely ever to occur but, nonetheless, it gives an idea of the extent of the immunity that members of each House possess." (Emphasis added).

Geoghegan J commented:

> "In my view the English, American and Australian case-law entirely supports the view taken of Article 15, s. 13 by O'Flaherty J. and I have no hesitation in adopting the views of O'Flaherty J. cited above as representing the correct interpretation of the constitutional provision."

At pages 249-250 he addressed a passage in the judgment of McCarthy J. in which Article 15, ss. 12 and 13 were contrasted, and commented:

> "I accept McCarthy J's view of the two sections but I think that he was essentially giving examples of the situations to which each of the respective sections would apply rather than giving an exclusive definition of their respective applications. *It would seem to me that Article 15 s. 12 is dealing with the privilege attaching to documents, whereas Article 15, s.13 is*

concerned with the privilege attaching to persons, that is to say the members of each House of the Oireachtas. As McCarthy J., points out, the documentary privilege protected by Article 15, s12 essentially relates to defamation." (Emphasis added).

59. The plaintiff relies upon the passage italicised above to argue that Article 15, s. 12 does not apply to the utterances of Deputies Murphy and Doherty, because the privilege is confined to documents. As we shall see, the latter part of the passage from the judgment of McCarthy J., which expressed the view that the Article 15, s. 12, privilege was confined to defamation, was not approved by the Supreme Court. The plaintiff argues, however, that the separate point made by Geogheghan J., that the Article 15, s. 12, privilege only applied to documents and not to persons has never been disapproved of.

60. In this regard, counsel for the plaintiff rely in particular on a passage in the judgment of O'Flaherty J. at page 283 of his judgment as approving this aspect of Geoghegan J.'s judgment. However, my understanding of this passage is that it consists merely of a description by O'Flaherty J. of what Geoghegan J. had held in the court below, having regard to the comments of McCarthy J. in the previous case. O'Flaherty J. was not at that point expressing approval or adopting the distinction between documents and persons. Later in his judgment, he went on to express his agreement with the Chief Justice that the privilege in Article 15, s. 12, was broader than a defamation privilege. However, he did not expressly approve or disapprove of the distinction between Article 15, ss. 12 and 13, as being a distinction between documents and persons. Neither in my view did Finlay C.J. in his judgment expressly approve of such a distinction in that case.

In the passage at page 268, where he disagreed that the Article 15, s. 12 privilege was limited to defamation, he did not explicitly express a view one way or another on the suggestion that Article 15, s. 12 applies to documents while Article 15, s. 13 applies to persons. His comments in the relevant passage at page 268 could, in my view, be read as implicitly supporting either proposition i.e. that there is or is not such a distinction. His views as set out at page 270 of the report appear to me to support the view that Article 15, s. 12 protects 'utterances' rather than 'documents.' I will come to the Supreme Court judgments in more detail shortly.

61. Another important issue addressed in the High Court was that of the relationship between individual constitutional rights (in that case, those of Mr. Goodman) and parliamentary privilege (asserted by the Deputies). In this regard, Geoghegan J. said that where the immunity applied, the personal rights of individuals could not trump it; stating "*In my view the privilege and non-amenability is absolute and intended by the Constitution to be absolute in the sense even that it cannot be sacrificed to protect other constitutional rights*." (Emphasis added).

62. In the course of his judgment in the Supreme Court, Finlay C.J. (with whom Egan and Blayney JJ. agreed) addressed the question of amenability, saying (at page 268):

> "With regard to Article 15, s. 12, the provision therein contained dealing with utterances made in either House, as distinct from the provisions dealing with official reports and publications, is that they shall be privileged wherever published. It was suggested in the judgment of McCarthy J. in *The Attorney*

General v. Hamilton [1993] 2 I.R. 250, at p. 283 and accepted in the course of his judgment by the learned trial judge in this case, that ‘the word 'privileged' has the same connotation as in the law of defamation’.

In so far as it is possible to construe this expression of opinion as confining the privilege provided for in Article 15, s. 12 to claims for defamation I am unable to follow it.

McCarthy J. in the course of his judgment refers specifically to the phrase in the Irish version of the Constitution, namely, "táid saor ar chúrsaí dlí". This would appear, literally, to be translatable as: "free from legal proceedings", yet an analysis of the consequences of making an utterance in the Houses of the Oireachtas which are dealt with by the combined effect of Article 15, s. 12 and Article 15, s. 13 of the Constitution would very clearly indicate that there are a great variety of legal proceedings which could follow upon the making of an utterance over and beyond a claim for damages for defamation, were it not for the privilege and immunity granted by these Articles.

It seems to me, therefore, that the proper construction of Article 15, s. 12 is that an utterance made in either House of the Oireachtas cannot attract or be the subject matter of any form of legal proceedings, wherever it may be published. The broad and absolute contention, therefore, which was part of the case submitted on behalf of the respondents in this appeal, that a dual statement - one made inside the House and repeated outside the House, that is to say, published outside the House - immediately destroyed all form of immunity or privilege does not seem to me to be correct.

With regard to the provisions of Article 15, s. 13, it is necessary, in my view, to consider a number of examples, though not necessarily a comprehensive list of examples, of ways in which a member of either House, were it not for the provisions of Article 15, s. 13, could be made amenable to a court or any authority other than the House itself, in respect of an utterance in the House. Such examples are:

That a member could be made liable

(1) as a defendant in a claim for defamation;

(2) as an accused on a charge of criminal libel;

(3) as a person charged with contempt of court, consisting of having made either

(a) a statement scandalising a court, or

(b) a statement prejudicing pending proceedings in a court;

(4) as a person charged with a criminal offence in respect of which it was alleged that the utterance could be adduced in evidence as proof of an admission;

(5) as a person sued for a civil remedy not arising from the utterance, but in respect of which the plaintiff sought to tender the utterance as relevant evidence;

(6) as a person charged with some criminal offence of which the necessary constituents are the making of the utterance concerned; and

(7) as a person compellable by a court or other authority, such as a tribunal, to explain or expand the utterance, including indicating the sources of information upon which it was based, for the purpose of an issue to be tried by the court or tribunal concerned.

The effect of Article 15, s. 13 on each of these potential instances in which a member might be made amenable to a court or other authority is, as a matter of law, in my view, an ouster of the jurisdiction of the court or other authority, rather than a privilege to be raised in bar by the member of the House, either as a party or, in the case of the example set out above at No. (7), as a witness, even though it is an ouster which can be waived - see *Dillon v. Balfour* (1887) 20 L.R. Ir. 600. Although in his judgment in that case Palles C.B. is dealing with the parliamentary privilege then recognised in the common law applicable at that time in Ireland, in my view, the reasoning of his judgment is equally applicable to the immunity from amenability contained in Article 15, s. 13.

Of the examples which I have just mentioned, of the potential amenability of a member of the House, were it not for the provisions of the Constitution, to a court or other authority, there is a sharp distinction between those listed at Nos. (1) to (6), inclusive, and No. (7). *In each of the examples from Nos. (1) to (6) the possibility of amenability arises in a case in which what was proposed would be to introduce evidence of an utterance made by the member of the House concerned so as to found a potential liability in law on his part in one or other of the instances to which I have referred.* In such examples of potential amenability, as far as Article 15, s. 13 is concerned (and leaving

aside for the moment the true meaning and extent of the privilege contended for publication, wherever made, of an utterance in the House in Article 15, s. 12) quite clearly the test as to whether the words are spoken or otherwise published, inside or outside the precincts of the House, is a valid test and subject to the question of the extended or broadened interpretation of Article 15, s. 13 with which I will later deal, may well determine the issue which arises. In the case, however, of the example which I have set out at No. (7) in the list above, which may be the relevant example for the purpose of the true issues in this case, there is not a question of evidence of a statement being tendered the admissibility of which may depend upon where the statement was made, but rather a question of what precise statement the member of the House is being asked to explain or expand." (Emphasis added).

63. It is important to recognise that Finlay C.J. prefaced the examples he gave with the comment that this was not necessarily a comprehensive list. Six of the seven examples given by him for the purpose of emphasising the broad scope of the immunity all have in common what he himself described as the use of utterances "*so as to found a potential liability in law on his [the Deputy's] part"*. The plaintiff in the present case points to this as indicating that the prohibition in Article 15, s. 13 as a basis for grounding a legal liability on the part of a deputy, but does not in any way preclude the granting of a declaration against the Clerk of the Oireachtas that certain utterances interfered with the administration of justice.

64. The seventh category referred to by Finlay C.J. – "as a person compellable by a court or other authority, such as a tribunal, to explain or expand

the utterance, including indicating the sources of information upon which it was based, for the purpose of an issue to be tried by the court or tribunal concerned" – is different from the other categories in the sense that the utterance is not being used as evidence to "found a potential liability in law on his part." However, the deputy has been, in that seventh example, compelled to attend before the authority, such as a Tribunal. It is prohibited, therefore, to compel a deputy to attend before a Tribunal or other authority to explain, expand upon, or disclose the sources of, an utterance in the House. The plaintiff argues that as there has been no attempt to bring the Deputies before the Court in these proceedings, there is no attempt to render them 'amenable' in this sense either.

65. Finlay C.J. also confirmed that, where the privilege applies, personal rights cannot outweigh it, nor indeed could the administration of justice itself;

> "With regard to the claim made for an extended interpretation of Article 15, s. 13 so as to include statements made to this Tribunal, having regard to its origin derived in part from the resolutions of the Houses of the Oireachtas, I am satisfied that it is not a submission which can be accepted. The provisions of Article 15, s. 12 and Article 15, s. 13 of the Constitution are explicit and definite in their terms, though the application of them may be a matter of complexity in certain instances. They constitute *a very far-reaching privilege indeed to members of the Houses of the Oireachtas with regard to utterances made by them in those Houses. They represent an absolute privilege and one which it is clear may, in many instances, represent a major invasion of personal rights of the individual, particularly, with regard to his or her good name and property rights.*

In addition, this immunity and this privilege constitutes a significant restriction on the important public right associated with the administration of justice of the maximum availability of all relevant evidence, a right which has been particularly emphasised in decisions of this Court in cases such as *Murphy v. Corporation of Dublin* [1972] I.R. 215, *Smurfit Paribas Bank Ltd. v. A.A.B. Export Finance Ltd.* [1990] 1 I.R. 469 and *Ambiorix Ltd. v. The Minister for the Environment (No. 1)* [1992] 1 I.R. 277. (page 270)"

It may be noted that the above comments suggest that Finlay C.J. viewed Article 15, s. 12 as covering utterances and not merely documents.

66. In the course of his judgment, O'Flaherty J. made the following comment, which appears to view the concept of amenability in very broad terms:

"It is clear that if an allegation is made in the Dáil, simpliciter, then absolute immunity attaches to it. *The person at the receiving end of the allegation has no redress in court.* For my part, however, I would think such a person is perfectly entitled to assert, in the press or otherwise, his version of events and that it would be only right and just that no sanction should attach to him for asserting his version of events in contradiction to what is laid against him with the protection of Dáil privilege. I cannot believe that those who raise the heat in a debate can afterwards complain of being scorched themselves." (Emphasis added).

In passing, it may be noted that the passage also assumes that the essence of the utterance is something in the nature of a defamatory assertion about an individual, which can be addressed or 'righted' in another forum such as the media by putting forward the alternative viewpoint which shows the utterance to

have been false. However, in the case of confidential information released into the public, this logic cannot apply; the information, once released into the public, cannot be rendered private again.

67. In another passage, O'Flaherty J. agreed with the Chief Justice that, as regards Article 15, s. 12, an utterance made in either House of the Oireachtas could not attract or be the subject matter of any form of legal proceedings, not merely defamation proceedings, and added:

> "'Privilege' must bear a wider meaning than the privilege appropriate to defamation proceedings (See, in general, McMahon & Binchy, Irish Law of Torts, 2nd ed. at page 641). In a defamation context, 'privilege' would have to be described as either absolute or qualified. In my judgment, the privilege set out in this section is an extensive one and is analogous to the immunity referred to in section 13."

68. In the course of her judgment, Denham J., as she then was, appeared to view the immunity in very broad terms:

> "The non-amenability granted under Article 15, s. 13 of the Constitution is an immunity for any utterance in either House. This powerful non-amenability is granted for the benefit of democracy and the People. It enables a deputy to say in the House matters which under the law he cannot say outside the Dáil without retribution. It is a cornerstone of democracy that members of the Oireachtas have free speech in the legislature. This right to free speech is for the protection of the democratic process and in doing so it protects parliament and deputies in parliament. This non-amenability of the deputy save to the House for his or her utterances is in protection of the separation of powers. By

this non-amenability for utterances in either House, save to the House, the legislature retains its separate strength free from any shackles an executive or a judiciary might wish to fit."

She also said:

"Bunreacht na hÉireann means what it says it means. It is an all-embracing non-amenability for utterances in the place named, by the person named."

69. Later in her judgment, Denham J. emphasised that the immunity does not mean that deputies are not answerable at all for their utterances, but rather that they are answerable to the House itself -

"The Constitution does not envisage total and absolute immunity in any circumstances for anybody. Thus deputies who make utterances in the House are liable to the House, and deputies who utter words outside the House are subject to the courts or any authority other than the House itself."

70. She also agreed with the view that the proper construction of Article 15, s. 12 was that an utterance made in either House of the Oireachtas cannot attract or be the subject matter of any form of legal proceeding, not merely defamation proceedings.

71. What emerges from *Hamilton (No.2)* therefore is: (a) that the privilege in Article 15 s12 is not confined to a defamation privilege; (b) that the immunity in Article 15.13 is very broad; (c) that personal and individual rights cannot 'trump' the privileges and immunities; and (d) that the immunity in Article 15.13 would operate to protect a Deputy from judicial response in cases of what would otherwise be a contempt of court.

72. The case of *O'Malley v An Ceann Cómhairle & Ors* [1997] 1 I.R. 427, which is, strictly speaking an Article 15, s. 10 case, should be mentioned nonetheless at this point because of the comments of the Court in relation to the exceptional jurisdiction to intervene in areas of non-justiciability, relied upon by the plaintiff. In this case, the applicant, who was a member of Dáil Éireann (although he had lost his seat by the time of the proceedings), had tabled a question in the Dáil to be answered by the Minister for Enterprise and Employment on the 24th May, 1989. The question concerned beef export figures to Iraq for the years 1987 and 1988 and the export-credit insurance provided for these exports in the same period, together with investigations in relation to those matters. On the 23rd May, 1989, the Ceann Comhairle wrote to the applicant, saying that he was disallowing part of the question as it would involve repetition in light of answers already received from the Minister. The applicant's complaint, a considerable number of years later, was that the question had been altered without reference to him and accordingly was in breach of Order 33 of the Standing Orders of Dáil Éireann. He sought leave to bring judicial review proceedings. The reliefs sought included *certiorari* of the decision to delete aspects of the applicant's question and declarations that the decision was unconstitutional as well as *ultra vires* Order 33 of the Standing Orders. In the High Court, Barron J. refused the applicant leave to apply by way of judicial review, holding that judicial review proceedings were not appropriate as this was an internal matter for Dáil Éireann for which there was an internal means of review. The Supreme Court (O'Flaherty, Murphy, and Lynch JJ.) dismissed the appeal, holding that the manner in which questions are framed for answer by Ministers of the Government is so much a matter concerning the internal working

of Dáil Éireann that it would be inappropriate for the court to intervene except in very extreme circumstances and that the framing of questions involves to such a degree the operation of the internal machinery of debate in the House so as to remain within the competence of Dáil Éireann to deal with exclusively pursuant to Article 15, s. 10 of the Constitution of Ireland, 1937.

73. The parties in the present case invited the Court to examine what was said in *O'Malley* about the exceptional jurisdiction which the courts were said to have to intervene in relation to matters reserved to the Oireachtas. In the course of his judgment, with which the others members of the Court agreed, O'Flaherty J. noted the argument made by Gerard Hogan SC (as he then was) on behalf of the applicant to the effect that the granting of leave would not interfere with the separation of powers because, while the right and duty to regulate its own affairs fell primarily to Dáil Éireann, it was necessary that an adjudication must be made from time to time as to whether there has been a breach of the separation of powers and that this duty devolved on the judges. He suggested two examples; (1) suppose the Government used its majority in the Dáil and Seanad to prevent the Oireachtas holding at least one session per year (Article 15, s. 7); or (2) if the Dáil did not meet within thirty days from the date of a general election (Article 16, s. 4, subs. 2). It was argued that, in such circumstances, the courts would be entitled to intervene. Responding to this argument, O'Flaherty J. said:

> "Since the court is not called on to resolve these questions now, it is sufficient to state that the problem posed for resolution here is a different one.
>
> How questions should be framed for answer by Ministers of the Government is so much a matter concerning the internal working of Dáil Éireann that it

would seem to be inappropriate for the court to intervene *except in some very extreme circumstances which it is impossible to envisage at the moment*. But, further, it involves to such a degree the operation of the internal machinery of debate in the house as to remain within the competence of Dáil Éireann to deal with exclusively, having regard to Article 15, s. 10 of the Constitution." (Emphasis added).

74. The *O'Malley* case concerned the framing of parliamentary questions, a matter which is intimately related to parliamentary speech. The principle which emerges from the Supreme Court decision is that it would be inappropriate for the courts to intervene in this area save in exceptional circumstances which, the court said, "it [was] impossible to envisage at the moment". This comment was made by the Court notwithstanding the two extreme examples referred by counsel noted above, namely if the Government were to use its majority in the Dáil and the Seanad to prevent the Oireachtas holding at least one session per year, or if the Dáil did not meet within thirty days from the date of a general election. It seems to me that the Court was signalling that any intervention by the courts in this area would require very exceptional circumstances indeed. The two examples given go to the very heart of the functioning of the Oireachtas itself, and it is not clear whether even in those two situations the Court would have approved of an intervention.

75. In *Howlin v Morris* [2006] 2 I.R. 321, which primarily concerned Article 15, s. 10 and the privilege relating to papers in the context of a discovery order made by a Tribunal, Hardiman J. said:

> "Article 15.12 and 13, respectively, themselves confer privilege on utterances in either House, a privilege from arrest and an immunity from amenability to any authority other than the House itself in respect of any utterance in either House."

This seems to me to be an 'utterance-centred' view of Article 15, s. 12; there is certainly no suggestion that the privilege is confined to documents.

76. In *Ahern v. Mahon* [2008] 4 I.R. 704, the interaction between Dáil utterances and the work of a tribunal of inquiry (the 'Planning Tribunal') was again explored. The matter was viewed through the prism of Article 15, s. 13. The tribunal were inquiring into the nature and source of certain lodgements that were made into the bank accounts of the applicant and persons with whom he was associated. The tribunal wished, in their questioning of the applicant, to draw his attention to inconsistencies between statements he had made outside the House and evidence tendered to the tribunal as well as statements he had made in Dáil Éireann. The applicant instituted judicial review proceedings seeking a declaration that the tribunal was prohibited from attempting to render him amenable for statements made by him in the House and an order of *certiorari* quashing the determinations of the respondents which rejected his claim of privilege. A Divisional High Court (Johnson P., Kelly and Ó Néill JJ.), held, in granting the reliefs sought, that Article 15, s. 13 of the Constitution protected members of the national parliament from direct and indirect attempts to make them amenable to anybody other than the Houses themselves in respect of utterances made in such Houses. It was not permissible to question a member of the national parliament about statements made in parliament which were

inconsistent with statements made outside it, as this might suggest that words spoken in parliament were untrue or misleading. The tribunal was entitled to reproduce, in whole or in part, statements made in parliament but it was not entitled to suggest that such words were untrue, misleading or inspired by improper motivation. It was for the reader of the report to draw conclusions as to whether statements were factually erroneous.

77. In the course of his judgment, Kelly J. (as he then was) referred to the judgments of Geoghegan J. in the High Court and Finlay C.J. in *Hamilton (No. 2)* [1993]. Consideration was also given to the decision in *Prebble v. Television New Zealand Ltd.* [1995] 1 A.C. 321, in which the Privy Council considered a claim by the defendants, in a libel action brought by a member of the New Zealand Parliament, that they were entitled to refer to statements made by the plaintiff in that Parliament in support of a plea of justification. It was held that parties to litigation could not bring into question anything said or done in the Parliament by suggesting (whether by direct evidence, cross-examination, inference or submission) that the actions or words were inspired by improper motives or were untrue or misleading, and that such matters lay entirely within the jurisdiction of the House.

78. Kelly J. went on to say:-

> "A consideration of the terms of Article 15.13 and the relevant case law demonstrate that the Article protects a member of the national parliament from *both direct and indirect attempts* to make such a person amenable to anybody other than the Houses themselves in respect of any utterance made in such Houses.

Drawing the applicant's attention to statements made by him in parliament which are inconsistent with statements made outside it, may incorporate a suggestion that the words spoken in parliament were untrue or misleading. That is not permissible.

I do not accept the contention of the tribunal that the purpose of such an exercise is to ensure that the evidence before the tribunal is complete. Rather, there is *a clear suggestion which imputes impropriety to the applicant in respect of utterances made in parliament. The court cannot permit the tribunal to engage in such activity.*

Before departing from this topic, and so there can no doubt about it, I repeat that the applicant's counsel accepts that the tribunal may record in its report that statements were made by him in parliament. It may reproduce those statements in whole or in part in its report. *It may not, however, suggest that such words were untrue or misleading or inspired by improper motivation*. It will be for the reader of the report to draw his own conclusions. He or she will decide on whether the applicant was or was not "factually erroneous" in the statements which he made in the Dáil. If the statements were erroneous, a reader may decide whether such inaccuracies were deliberate or accidental. *To put it another way, the applicant may be judged by the court of public opinion in respect of his parliamentary utterances but not by the tribunal*." (Emphasis added).

79. The above represents a very broad statement of the immunity in Article 15, s. 13. It makes it clear that neither a court, nor a tribunal, may comment upon utterances made in the Oireachtas. It may not state, decide or even imply that the

utterances were untrue or misleading or inspired by improper motivation. The most it can do is 'reproduce' them without comment. The prohibition extends not only to 'direct' but also to 'indirect' attempts to make the Deputy amenable to an authority other than the House. It was of course, unlike the present case, a case where the Deputy was before the Tribunal in question. There was no suggestion that this was viewed by Kelly J. (as he then was) as in any way inconsistent with the views expressed in *Hamilton (No.2).*

80. In *Callely v. Moylan* [2014] 4 I.R. 112, members of the Supreme Court made important statements both as to the nature of the immunities in ss. 12 and 13 of Article 15 and as to when, even in an area of non-justiciability, the courts might exceptionally be permitted to enter the non-justiciable zone and provide a legal remedy. The factual background to the *Callely* case involved an internal parliamentary disciplinary inquiry in respect of a member's expenses following complaints that had been made by members of the public concerning the matter. The complaints were referred to the Committee on Members' Interests of Seanad Éireann which decided that there was sufficient evidence to sustain a complaint and that it would carry out an investigation in accordance with the provisions of the Ethics in Public Office Act, 1995, and the Standards in Public Office Act, 2001. Following its investigation into the complaints, the Committee issued a report which, *inter alia*, found that the respondent had intentionally misrepresented his normal place of residence for the purpose of claiming allowances. On the recommendation of the Committee, a resolution was passed by Seanad Éireann suspending the respondent from the service of the Seanad for a period of 20 days and withholding his salary for the period of the suspension. The respondent sought leave to apply for, *inter alia*, an order of *certiorari*

quashing the report of the Committee and the resolution of Seanad Éireann. The High Court, in both granting leave and the substantive relief sought, upheld the submissions of the respondent that the determination of the Committee was based on an error of law and arrived at in breach of natural justice and fair procedures. The Committee and Seanad Éireann appealed to the Supreme Court, contending that the issues raised in the proceedings were non-justiciable and further, that there had been no breach of fair procedures. By a majority of 4 (Murray, Hardiman, Fennelly and McKechnie JJ.,) to 3, the Supreme Court held that the matters were justiciable. By a differently constituted majority of 4 (Denham C.J., Fennelly, Clarke and O'Donnell JJ.) to 3, the Supreme Court held that there had been a breach of fair procedures.

81. The inquiry in *Callely* was conducted both pursuant to Article 15, s. 10 of the Constitution and legislation, namely the Ethics in Public Office Act, 1995 and the Standards in Public Office Act, 2001. In relation to the justiciability issue, Murray, Hardiman and McKechnie JJ in their separate judgments took the view that Article 15, s. 10 did not contain a general ouster of the courts' jurisdiction. In reaching this conclusion, it was important to their reasoning to contrast the wording of ss. 12 and 13 of Article 15 with s. 10 of that Article. In describing ss. 12 and 13, Hardiman J. said:

> "The point that is immediately relevant is that these Articles provide examples of the express constitutional creation of an area of privilege which, at least in the two latter cases, amounts to non-justiciability of the issue before any court. Nothing of this kind is provided, at least expressly, in Article 15.10 – that is

the reason why the Committee is constrained to contend for a construction of that Article that goes beyond its mere express words."

He referred to the canon of construction referred as *expression unius exclusio alterius* and considered that it was very suggestive of the proper interpretation of Article 15, s. 10. He said that the courts should be slow to conclude that the jurisdiction of the High Court is excluded or ousted, referring to judicial statements in *Tormey v. Ireland* [1985] I.R. 289 (Henchy J) and *The State (Pine Valley) v. Dublin County Council* [1984] 1 I.R. 407, and stated:

"I believe that strong and unambiguous language is needed to oust the *prima facie* jurisdiction of the High Court, which the courts should be reluctant to see ousted."

82. McKechnie J. referred to the views of Finlay C.J. in *Hamilton (No. 2)* as to the far-reaching nature of the privileges and immunities in Article 15, ss. 12 and 13, and the need to interpret them strictly for that reason. He applied that reasoning to the construction of Article 15, s. 10, and the inquiry before him:

"There can be no doubting the enormity of the immunities which are provided for by the provisions of Article 15.10, 15.12 and 15.13 of the Constitution. In argument, counsel on behalf of the appellants described them as 'awesome', saying that, even in the face of injustice, the courts were required to step back in the interest of good governance. They are conferred on one body of citizens only, namely parliamentarians; their exercise may have the potential of inflicting grave damage and creating even life threatening consequences for third parties who, despite the circumstances, must remain without legal redress as the justice system is left powerless to intervene.

The justification for such privileges and immunities is undoubtedly substantial and must be both acknowledged and respected. However, the effective and unfettered exercise of the duties and functions of the legislative arm would not be unduly affected if the duties and parameters of such immunities are viewed strictly […]"

83. The joint judgment of Clarke and Donnelly JJ., with which Denham C.J. agreed, (which was the minority view in respect of the justiciability issue in that particular case) took the view that the Callely inquiry was not justiciable, because a principle of non-justiciability was to be derived from the constitutional provisions on the separation of powers even thought there was no express ouster of jurisdiction in Article 15, s. 10 itself. It is not necessary at this point to examine the detailed route by which this conclusion was reached, but it is noteworthy that they took the view that this non-justiciable zone was not completely beyond the reach of judicial review and that, in exceptional cases, a court might intervene:-

"Furthermore, the fact that the Constitution requires that there remain an area of activity in the legislature which is non-justiciable does not mean that that area is beyond the reach of the Constitution. The Oireachtas is itself required to uphold the Constitution and to respect the rights of citizens, whether members or not. This indeed, is no doubt why the Oireachtas has adopted rules to protect individuals in the context of the exercise of freedom of speech within the Oireachtas which is guaranteed by the Constitution and why there is elaborate provision for fair procedures in the legislation providing for committee hearings under the ethics in public office legislation. The fact that

there cannot be immediate recourse to the courts places, if anything, a heavier onus on the Oireachtas to ensure that constitutional rights are respected in proceedings which are themselves non-justiciable. Finally, and on a related point, the fact that the area of non-justiciability is itself derived from the principle of separation of powers under the Constitution is itself a limitation on the manner in which the powers may be exercised. *A principle which is derived from the Constitution and intended to maintain constitutional equilibrium could not be used to subvert the order and values protected by the Constitution. Accordingly, proceedings which amounted to a fundamental departure from the dictates of the Constitution, which was neither prevented nor remedied by the Oireachtas itself then (as indeed was perhaps contemplated in passing in cases such as Finn v. The Attorney General [1983] I.R. 154, Slattery v. An Taoiseach [1993] 1 I.R. 286 and O'Malley v. An Ceann Comhairle [1997] 1 I.R. 427) the courts could be obliged to act to maintain the Constitutional balance.* It is, however, neither necessary nor perhaps desirable to speculate on the precise circumstances in which it could be said that the principle of the separation of powers no longer required that the proceedings of the legislative power be beyond judicial scrutiny. *No such case is alleged here and nor does it appear to have arisen as a matter of history since the foundation of the State. It is not to be readily assumed that such an occasion would arise in the future*." (Emphasis added).

84. Fennelly J., whose judgment was for the majority on the justiciability issue by reason of the statutory basis for this particular form of inquiry, expressed agreement with the joint judgment on the particular matter of the exceptional jurisdiction to intervene:

"In this context, I express my agreement with the statement, at para.250 of the joint judgment of O'Donnell and Clarke JJ., that a 'principle which is derived from the Constitution and intended to maintain constitutional equilibrium, could not be used to subvert the order and values protected by the Constitution.' Thus, if it should transpire that a House of the Oireachtas was either generally or in a particular case disposed to ignore and not observe the constitutional imperatives, the courts, as the ultimate guardians of rights, would be bound to intervene. It is not easy to imagine such circumstances or to devise a standard. Tentatively, I would suggest that the standard should be that of "clear disregard" of constitutional rights adopted in such cases as *Curtin v. Dáil Éireann* [2006] IESC 14 , [2006] 2 I.R. 556 mentioned above."

85. It may also be noted that Murray J. also thought that in areas of non-justiciability the courts still retained an exceptional residual jurisdiction:

"In short, it seems to me that to adopt the view that the courts have no such jurisdiction would be the antithesis of respect for the separation of powers denying, as it would, the role accorded to the judiciary to safeguard personal rights and to ensure that powers are exercised lawfully and constitutionally."

86. Relying on the above passages, the plaintiff in the present case submits that if, contrary to their arguments, the court takes the view that the concept of 'amenability' in Article 15, s. 13 does normally preclude the court from granting the relief of declaration in respect of utterances in the Houses, the court should nonetheless go on to find that this is an exceptional case of the type envisaged in those passages and that the declarations sought should be granted in order to safeguard the separation of powers.

87. Most recently, in *Kerins v. McGuinness and Ors*, [2017] IEHC 34 (Kelly P., Noonan and Kennedy JJ.), a Divisional High Court discussed freedom of speech in the Oireachtas under the Constitution. This arose in the context where the plaintiff had attended a day-long hearing before the Public Accounts Committee on a voluntary basis and was aggressively questioned about matters relating to her salary, pension and other matters connected with her position as CEO of Rehab, a charitable organisation partly funded by public monies. The Court ultimately held that, notwithstanding the undoubted damage done to her good name and the personal injuries suffered by her as a result, the matter was non-justiciable in the courts. In the course of its judgment, the Court comprehensively examined the authorities referred to above, as well as *Church of Scientology of California v. Johnson-Smyth* [1972] 1 QB 522; *R. v. Secretary of State for Trade ex parte Anderson Strathclyde Plc.* [1983] 2 All ER 233 and *Garda Representative Association v. Ireland* [1989] I.R. 193, where Murphy J., speaking of Article 15, s. 13 observed (at page 204):

> "This provision is expressed in wide terms and obviously it is desirable that it should be interpreted in such a way as to permit and encourage members of the Oireachtas to engage in debate on matters of national interest without having to restrict their observations or edit their opinions because of the danger of being made 'amenable to any court or any authority' at the suit of some person who may feel aggrieved by the statements made in the course of debate."

88. Having referred to paragraph 55 of the joint judgment of O'Donnell and Clarke JJ. in *Callely*, where it was stated that any theory that an internal

Oireachtas inquiry must be justiciable because the member's right to a good name may be affected must explain how the Constitution could contemplate such justiciability when it expressly protects utterances of members and collective reports from legal action of any sort, the Divisional Court stated:

> "It seems to us that the latter observations by O'Donnell and Clarke JJ. must in principle be equally applicable in the case of a non-member such as arises in these proceedings. The fact that utterances in themselves trench upon the good name of a citizen who is not a member of the Oireachtas cannot of itself render that issue justiciable in the face of the clear constitutional prohibition."

89. The Court ultimately held that the plaintiff's claim was non-justiciable and laid heavy emphasis on the fact that her attendance before the Public Accounts Committee was voluntary in nature. Accordingly, the comments and questions of the members were not adjudications and were mere utterances having no legal effect and therefore non-justiciable before the courts:

> "They were no more than utterances and as such Article 15.13 has the effect of ousting the court's jurisdiction. The essence of the applicant's case is a claim for damages arising from those utterances which seeks to make the Oireachtas respondents amenable to the jurisdiction of the court. That cannot be done.
>
> 108. To adopt the words of Johnston J. in *Cane v. Dublin Corporation* [1927] I.R. 582 (at p. 601):
>
> > 'It would be strange, indeed, if a Court of law were to have the power to pass under review the evidence and the proceedings before a Parliamentary Committee.'

109. Ms. Kerins has in various ways invited the court to analyse the utterances in terms of tone and content and to test them for bias, propriety and more. This is to invite the court to examine, discuss and adjudge words used in parliament, the very thing that Blackstone said was not to be done." (Emphasis added).

Again, this broad view of the Article 15, s.13 immunity was not seen as in any way inconsistent with *Hamilton (No. 2).*

90. For completeness, I refer to the case of *Doherty v. Government of Ireland* [2011] 2 I.R. 222, which was relied upon by the plaintiff. This was a case in which the applicant was granted a declaration that there had been unreasonable delay on the part of the Government in moving the writ for the by-election in a constituency which had a vacant seat after the election of a Deputy to the European Parliament. Efforts had been made in Dáil Éireann to move a writ for the by-election, but these efforts were resisted by the Government. The applicant asserted that the Government's delay in moving the writ had resulted in an under-representation of the constituency in Dáil Éireann and that the failure to move to fill the vacancy within a reasonable time had resulted in a denial of his constitutional rights. It was argued on behalf of the respondents that the matter was non-justiciable. However, the High Court (Kearns P.) held that it was justiciable and ultimately granted the relief sought. In the course of his judgment, he said:

"While clearly, as illustrated by decisions such as *O'Malley v. An Ceann Comhairle* [1997] 1 I.R. 427 (a case in which the applicant contended that certain parliamentary questions had been wrongly disallowed by An Ceann

Comhairle), internal matters and the internal workings of Dáil Éireann - not involving citizens outside the House - fall outside the appropriate remit for the court's intervention, this is not such a case because the applicant is in a position to assert that his constitutional rights are being breached or rendered inoperative because of the manner in which the Government is applying and exercising the provisions of s. 39(2) of the Electoral Act 1992."

This does not appear to me to provide support for the plaintiff's case in the present proceedings, because neither the case itself nor the authorities relied upon by Kearns P. in granting the relief sought concerned the special and unique terms of the privileges and immunities conferred by ss. 12 and 13 of Article 15 on freedom of speech in the Oireachtas, or an inquiry conducted pursuant to Article 15, s. 10. Indeed, the reference by Kearns P. to the *O'Malley* case as being different from the one before him tends to favour the defendants in the present proceedings rather than the plaintiff.

Non-Irish authorities

91. The above Irish authorities contain ample and authoritative guidance, specific to the Irish constitutional context, for the Court to reach a decision on the justiciability issues which comprise the first limb of the Plaintiff's case. For completeness, I should record that I was referred to a considerable amount of non-Irish authority, which were of interest but could not carry anything like the weight of the above Irish decisions.

92. As regards to the jurisprudence of the European Court of Human Rights, the Court was referred in particular to *Young v. Ireland* (1996) 21 EHRR CD91, *A v. United Kingdom* (2003) 36 E.H.R.R. 51, and *Zollmann v. The United*

Kingdom (Application no. 62902/00, 27th November, 2003). The European Court of Human Rights authorities are of particular interest because of Ireland's international obligations under the European Convention on Human Rights, as well as its domestic obligations under the European Convention on Human Rights Act, 2003. In *Young v. Ireland*, the applicant was a medical consultant who complained that his good name and reputation in the exercise of his profession had been damaged by statements made by a member of the Dáil. He complained under Article 6(1) of the European Convention that he had no access to a fair and public hearing by an independent tribunal because the Committee on Procedure and Privileges was in private and did not enable him to participate in any way, and was not independent because of its composition of TDs. He also made a complaint pursuant to Article 8 of the Convention (privacy). The Commission, declaring his application inadmissible, said:

> "The underlying aim of the immunity accorded to TDs is clearly in furtherance of the public interest to allow TDS to engage in meaningful debate and represent their constituents on matters of public interest (in the present case public safety and the quality of medical treatment in hospitals) without having to restrict their observations or edit their opinions because of the danger of being amenable to a court or other such authority."

The Commission went on to consider the proportionality of immunity on the facts and noted: (a) that the statement did not mention the applicant by name: (b) that it was not unreasonable to assume that the small circle of colleagues who would have connected the TD's statement with the applicant would have equally noted the outcome of the coroner's inquest which the applicant said completely

vindicated his position. It held that in those circumstances it was not necessary to determine the contribution to the proportionality of the immunity by the review conducted by the Committee on Procedure and Privileges, although the Commission said that such a review might be relevant to the question of proportionality absent those factors.

93. In *A v. United Kingdom*, the Court went much further. In this case, the applicant was living with her two children in a house owned by the local housing association, when a member of her constituency, in initiating a debate about housing policy, referred to her in the House of Commons. He gave her name and address, referred to members of her family and gave highly pejorative descriptions of antisocial behaviour on their part, describing them as the 'neighbours from hell.' Lurid newspaper coverage then followed. The applicant subsequently received hate mail containing racist abuse and she was also stopped in the street, spat at and abused by strangers. The applicant wrote, through her solicitors, to the MP, outlining her complaints and seeking his comments. The letter was referred to the Office of the Parliamentary Speaker by the MP. The Speaker's representative replied to the MP on the 12th August, 1996 to the effect that the MP's remarks were protected by absolute parliamentary privilege. The applicant's solicitors also wrote to the then Prime Minister, Mr John Major, asking that, as leader of the political party to which the MP belonged, he investigate the applicant's complaints and take appropriate action. The Prime Minister's Office replied on the 6th August, 1996, stating that it was a matter for individual Members of Parliament to decide how they deal with their constituents and it is not for the Prime Minister to comment.

94. The applicant brought proceedings before the European Court of Human Rights, complaining that the absolute nature of the privilege which protected the Member of Parliament's statements about her in Parliament violated her rights of access to a court under Article 6.1 (right of access to the courts) and Article 8 (privacy) of the Convention. Although she accepted that parliamentary privilege pursued the legitimate aims of free debate and regulation of the relationship between the legislature and the judiciary, she submitted that it did so in a disproportionate manner. She contended that the broader an immunity, the more compelling must be its justification, and that an absolute immunity such as that enjoyed by MPs must be subjected to the most rigorous scrutiny. She drew attention to the severity of the allegations made in the MP's speech and his repeated reference to the applicant's name and address, both of which she claimed were unnecessary in the context of a debate about municipal housing policy. She also pointed to the consequences of the allegations for both her and her children, which she said were utterly predictable. The Government, she alleged, had failed convincingly to establish why a lesser form of protection than absolute privilege could not meet the needs of a democratic society and in particular, why it was necessary to protect those MPs who on rare occasion speak maliciously, making gravely damaging statements. The applicant also submitted that the parliamentary avenues of redress identified by the Government did not offer access to an independent court and failed to provide her with any effective remedy.

95. The Court held that there had been no violation of Article 6 or Article 8. In the course of its judgment, the Court noted that the immunity was designed to protect the interests of Parliament as a whole as opposed to those of individual MPs. Notably, the Court accepted the applicant's submissions to the effect that

the allegations made about her in the MP's speech were extremely serious and clearly unnecessary in the context of the debate, particularly the repeated personal references to the applicant, and that the consequences of the MP's comments on the lives of the applicant and her children were entirely foreseeable. Nonetheless, these factors did not alter the Court's conclusion as to the proportionality of the parliamentary immunity at issue, as it took the view that the creation of exceptions to that immunity, the application of which depended upon the individual facts of any particular case, would seriously undermine the legitimate aims pursued. This is an interesting point in the context of the plaintiff's submission in the present case to the effect that the utterances revealing information which is the subject of a court order of confidentiality are not 'protected' speech and that the Court should distinguish between utterances which are legitimate and those which are not.

96. I was also referred to the decision in *Zollmann v. United Kingdom*, in which the Court made clear that its assessment in *A v. United Kingdom* was not dependent in any way upon the availability of a parliamentary remedy. Peter Hain, Minister of State at the Foreign and Commonwealth Office responsible for Africa, named the applicants, who were involved in the diamond business, in the House of Commons, as persons who were guilty of breaching a UN embargo on diamond trading with UNITA and of having bribed officials. They brought complaints pursuant to Articles 6, 8, 13, and 14 of the Convention; the complaint under Article 13 being that they had no effective remedy available to them. The applicants argued that their case could be distinguished from *A v. United Kingdom* on the basis that the Court in that judgment had regard to the fact that the applicant was not deprived of all possible redress since an MP could have

taken up her complaints and petitioned in Parliament for a retraction, whereas this was not possible in their case because they were foreigners accused of serious wrongdoing. The Court said that this factor had not been decisive to its reasoning in *A v. United Kingdom* and saw no reason to depart from its assessment as to the proportionality of the immunity. The Court held the complaints to be manifestly ill-founded and they were rejected pursuant to Article 35.3 and 35.4 of the Convention.

97. Also, in *Karácsony & Ors. v. Hungary* (Application no. 42461/13, 16th September, 2014), a decision of the Grand Chamber, the Court continued to affirm the importance of parliamentary speech to the proper functioning of a democracy and the autonomy of parliament in disciplining its own members. This arose in a context where the complaint was made by members of Parliament who had been disciplined for different forms of disorderly conduct in Parliament, such as displaying banners and placards and using a megaphone. While the issue is, therefore, somewhat different to that arising in the present case, and indeed the Court ultimately held that the disciplinary sanctions overstepped the mark and there had been a violation of the parliamentarians' Article 10 (free speech) rights, the Court continued to make ringing declarations as to the importance of parliamentary speech. For example, the court said:

> "There can be no doubt that speech in Parliament enjoys an elevated level of protection. Parliament is a unique forum for debate in a democratic society, which is of fundamental importance. The elevated level of protection for speech therein is demonstrated, among other things, by the rule of parliamentary immunity. The Court has acknowledged that the long standing

practice for States generally to confer varying degrees of immunity on parliamentarians pursues the legitimate aims of protecting free speech in Parliament and maintaining the separation of powers between the legislature and the judiciary. Different forms of parliamentary immunity may indeed serve to protect the effective political democracy that constitutes one of the cornerstones of the Convention system, particularly where they protect the autonomy of the legislature and the parliamentary opposition […] The protection afforded to free speech in Parliament serves to protect the interests of Parliament as a whole and should not be understood as protection afforded solely to individual MPs (see *A. v. the United Kingdom*, cited above, § 85)."

And:-

"The Court notes that the rules concerning the internal operation of Parliament are the exemplification of the well-established constitutional principle of the autonomy of Parliament. […] In accordance with this principle, widely recognised in the member States of the Council of Europe, Parliament is entitled, to the exclusion of other powers and within the limits of the constitutional framework, to regulate its own internal affairs, such as, *inter alia*, its internal organisation, the composition of its bodies and maintaining good order during debates. The autonomy of Parliament evidently extends to Parliament's power to enforce rules aimed at ensuring the orderly conduct of parliamentary business. This is sometimes referred to as "the jurisdictional autonomy of Parliament". According to the Venice Commission, the majority of parliaments have internal rules of procedure providing for disciplinary sanctions against members (see paragraphs 48 49 above)."

98. The plaintiff correctly points out that the European Convention authorities referred to do not involve the interaction between the parliamentary speech and the administration of justice. This being the case, it is all the more important to ensure that the present analysis is anchored upon the Irish constitutional provisions; once one embarks upon an analysis which involves separation of powers, the domestic legislative and constitutional provisions become even more crucial. As matters stand in the Strasbourg jurisprudence, in any event, there seems to me be little or nothing contained therein to advance the plaintiff's claim.

99. I was also referred to the English case of *Goodwin v. News Group Newspapers Ltd*. [2011] EWHC 1437. In terms of the facts, it was the closest to those arising in the present case because it concerned utterances in Parliament which revealed information which was the subject of court proceedings designed to protect the confidentiality of that information. The nature of the information was that a former Chief Executive of the Royal Bank of Scotland (RBS) had had a sexual relationship with another RBS employee. As in the present case, the defendant newspaper had sought unsuccessfully to rely on certain public interest arguments in resisting the injunction. Subsequently, a member of the House of Lords revealed the identity of the applicant for the injunction. Following this, when the matter next came before the Court, the claimant accepted that the injunction should be varied so as to permit the identification of himself as the applicant for the injunction. There were subsequent court dates, at which various public interest arguments were again raised. The Court ultimately granted the defendant's application in part and varied the injunction to the extent that it removed the prohibition upon publication of the RBS employee's job description but not the prohibition upon publication of her name.

100. The judgment to which I was referred is a report of the proceedings as between the claimant and the newspaper. In the course of his judgment, at paragraph 22, Tugenhat J. observed that:

> "*Lord Stoneham was frustrating the purpose of the court order and thus impeding the administration of justice, but he was doing so under the protection of Parliamentary privilege. If he had identified Sir Fred Goodwin in words spoken outside Parliament he would have been interfering with the administration of justice, or committing a contempt of court, as it is called*".

This confirms the view that, in the UK, parliamentary utterances would not be actionable in circumstances of what would otherwise be a contempt of court. However, the passage cited was *obiter* in the context of a proceeding by the claimant against the newspaper and there was presumably no detailed argument as there has been in the present case, where proceedings have been brought against the parliament itself.

101. The Plaintiff's written submissions referred the Court to a number of United States authorities concerning the separation of powers, with particular emphasis on those in which an alleged interference by the legislature with the role of the judiciary was in issue, although considerably less emphasis was placed on those authorities at the oral hearing. For a number of reasons, I do not propose to deal with these in any detail. In the first instance, United States authorities must be read with caution, given the fact that although a common ancestral root can be traced to Article 9 of the Bill of Rights, the Speech and Debate clause in the United States Constitution is differently worded to the provisions of the Irish Constitution. It provides that "for any Speech or Debate in either House, they

shall not be questioned in any other Place." Secondly, while the concept of the separation of powers also characterises the United States form of government, the detail of its implementation in each jurisdiction is imbedded within its own specific constitutional, legal, social and political context. The need for caution when considering constitutional authorities from other jurisdictions in this context was emphasised by Finlay CJ in *Attorney General v. Hamilton (No.2)*. Words of warning of similar effect were also issued by a number of the judges in *Maguire v. Ardagh*. Thirdly, and most importantly of all in the present case, none of the authorities cited by the plaintiff from the United States involved a situation similar to that before me, where parliamentary utterances by individual parliamentarians were alleged to have interfered with existing court proceedings. Many of the authorities cited were similar, in a broad sense, to Irish cases within the *Buckley* line of authority already referred to: *United States v. Klein* 80 US 128 (1872); *United States v. Brown* 381 US 437 (1965); *Plaut v. Spendthrift Farms* 514 US 211 (1995). Indeed, if anything, as the submissions of the Attorney General pointed out, there is arguably greater latitude shown in the United States towards legislative acts which change the ground rules of pending court proceedings, examples of which include *United States v. Schooner Peggy* 5 US (1 Cranch) 103 (1801); *Pennsylvania v. Wheeling and Belmont Bridge Co.* 59 US (18 How) 421 (1855); *Robertson v. Seattle Audubon Society* 503 US 429 (1992); *Bank Markazi v Peterson* 136 S Ct 1310 (2016) and *Miller v. French* 530 US 327 (2000). The Plaintiff also referred to cases such as *Gravel v. United States* 408 US 606 (1972) and *United States v. Brewster* 408 US 501 (1972) which concerned non-legislative words or acts of parliamentarians. However, neither case involved a situation akin to that arising in the present case and, to my mind,

when examining the pronouncements of other courts in other cases, especially non-Irish cases, context is everything. Accordingly, the United States authorities do not, in my view, advance the analysis beyond the detailed and authoritative analysis of the Irish constitutional provisions already described.

102. I was also referred to legislation in Australia and New Zealand, namely the Parliamentary Privileges Act 1987 (Australia) and the Parliamentary Privileges Act 2014 (New Zealand). In both cases, the legislation provides that in proceedings before any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of, *inter alia*, questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament; otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament. Thus, the legislation in those jurisdictions puts beyond any doubt that the concept of amenability is extremely broad. However, such materials, while of interest, cannot directly assist the Court in reaching an interpretation of the Irish constitutional provisions. A number of New Zealand and Australian authorities were also cited to the Court, but did not, in my view, particularly advance the analysis beyond suggesting that the principle of comity as between the organs of State is an important principle in many jurisdictions and that the organs of State generally do and should endeavour to confine themselves to their proper spheres of activity within their own constitutional contexts. None of the cases presented facts similar to the present case.

My Conclusions on the First Limb of the Plaintiff's case

103. It has always been clear in Ireland as well as elsewhere that although the Oireachtas and the courts have their respective functions, particular tensions could potentially arise as between the freedom of deputies to speak in the Oireachtas about proceedings before the courts. The very existence of Oireachtas Standing Orders dealing with matters which are *sub judice* make this clear. The release of confidential information which is the subject of a court order creates a very particular problem at the intersection between parliamentary speech and the administration of justice. By way of contrast, the case of an alleged defamatory statement, the individual who alleges that he or she has been defamed might at least seek to undo the harm by using other avenues, such as the media, to present an alternative version of facts, although it has to be said that this theory tends to be somewhat neutral, or perhaps, blind, as to the differences in power and media access of different individuals. Another example is the case of an utterance which might create a prejudice to court proceedings, such as an utterance which might influence a jury in a criminal trial; here the criminal trialmight be adjourned to allow for the 'fade' factor to operate. The particular difficulty presented by the release of confidential or private information is that, once released into the public arena, it can never be 're-privatised.' The concept of presenting an 'alternative' viewpoint in the media, for example, whatever about its merits in a defamatory context, simply has no application at all to the release of private information which was the subject of a court order. Therefore, the tension between the freedom of speech in the Dáil and the role of the courts reaches an extremely acute point in a case where a member of the Houses releases confidential information, subject to a court injunction, into the public

arena by means of an utterance in the House. At this acute point of tension, do the Irish constitutional provisions constrain the courts from taking any action or indeed entertaining proceedings, on the principle of non-justiciability? Or, is a breaking point reached in a case such as the present which enables the Court to go beyond its normal limits and exercise an exceptional jurisdiction to vindicate the personal rights of the plaintiff or protect its own constitutional territory delimited by Article 34 of the Constitution?

104. It seems to me that in answering this, the first decision to be made is whether or not Article 15, s. 12 of the Constitution applies to utterances in the Dáil. I have sought to highlight in my examination of the authorities above how the relationship between sub-sections 12 and 13 of Article 15 has been described in various judgments throughout the years. The highpoint of the plaintiff's argument that Article 15, s. 12 is confined to documents appears to be the passage from the judgment of Geoghegan J. in *Hamilton (No. 2),* referred to above. I have not been able to discern any support, in either the Supreme Court judgments in *Hamilton No. 2* or any subsequent authorities, for the view that Article 15, s. 12 is confined to documents. If anything, a different distinction appears to me to emerge from the judgments, namely, that Article 15, s. 12 is primarily directed at utterances, while Article 15, s. 13 is primarily directed at the persons of deputies. In view of the wording of Article 15, s. 12, it is rather difficult in any event to see how it could possibly be confined to reports of the utterances and not the utterances themselves. Perhaps the reference to 'documents' crept in because speech would always have to be recorded in some form before it could be disseminated outside of the House (formerly, in writing, in modern times presumably by means of electronic recordings, subsequently transcribed). In any

event, it would seem to me inconceivable that the framers of the Constitution intended Article 15, s. 12 to confer protection on reports of utterances but not the utterances themselves. In previous cases, it has not been necessary to focus on the precise distinction between ss. 12 and 13 of Article 15 in this regard because the factual situation arising in the case, or envisaged in the example given in a judgment, was one where the member was brought before a court or tribunal *and* it was sought to examine an utterance, and therefore both an utterance and a member were simultaneously involved. In the present case, there is no member before the Court, because of a procedural or tactical decision by the plaintiff not to sue the Deputies, and what is solely in issue is whether utterances can be the subject of proceedings. For this reason, it became the first Irish case where the utterance itself is directly the subject of court proceedings unaccompanied by the member who issued the utterance. It seems me that the privilege in Article 15, s. 12 must apply to the utterances themselves and on this view, the case therefore falls to be decided, strictly speaking, on the basis of the immunity in Article 15, s. 12. However, in my view Article 15, s. 13 and how it has been interpreted must also exert a considerable influence upon the interpretation of the immunity in Article 15, s. 12.

105. The next issue for decision is the scope of Article 15, s. 12. It has been made clear by the Supreme Court in *Hamilton No. 2* that the privilege in 15, s. 12 is not confined to a privilege from defamation proceedings and is a much broader privilege. Indeed, the words 'táid soar ar chúrsaí dlí' could not be any more absolute; the utterances are 'free from legal proceedings.' On that basis alone, I would reach the conclusion that the Deputies' utterances, the subject of the present case, cannot be the subject of the Court's adjudication and condemnation.

However, I believe this conclusion to be further fortified by a consideration of the broad interpretation given to the immunity in Article 15, s.13 by the authorities considered above, which say not only that a deputy is immunised from a penalty or liability but also that he is immunised from having to explain the utterance (whether in terms of content or motivation) in a court or tribunal. It would seem to me illogical if the immunity given to the individual deputy in Article 15, s. 13 were greater in scope than the privilege afforded to the utterance itself in Article 15, s. 12, since the reason for giving the Deputy the immunity in the first place is because of the value of free speech in the Dáil. A harmonious interpretation in my view suggests that a consistent interpretation be given to the scope of the privileges and immunities in Article 15, ss. 12 and 13. In my view, having regard to the importance of the core value being protected, namely parliamentary speech, which has been described and explained eloquently in many authorities, what was intended by the framers of the Constitution in providing for both Article 15 s.12 and Article 15.s.13 was to create a basket of privileges and immunities to ensure that the courts (and tribunals) would not be involved in the exercise of analysing and pronouncing upon parliamentary speech, whether in terms of the content of the speech, or the motivation of the speaker, irrespective of how the issue presented itself to the court (or tribunal), whether via the utterance, the person of the member who had made the utterance, or both. The authorities cited above repeatedly emphasise the unusually robust nature of the language used in Article 15 ss12 and 13 and the reasons for it.

106. It does not seem to me that the fact that the individual Deputies were not sued in these proceedings enables the plaintiff to overcome the prohibitions in sections 12 or 13 of Article 15, articulated in cases such as *Ahern v Mahon* and

Kerins. If the Court were to entertain the proceedings for the purpose of granting the declarations sought, it would have to engage in a detailed examination of the utterances made by the Deputies and indeed, it might be thought to be worse rather than better that the court would engage in such a process in a situation where the Deputies themselves are not parties to the proceedings. In any event, it does not seem to me that the content of the privilege or immunity could be so easily emptied of substantive effect simply by the procedural device of not suing the individual deputy who made the utterance.

107. Nor does it seem to me that the situation is altered by the fact that the relief sought is declaratory in form. If the Court were to grant the reliefs, it would in effect be reaching a formal legal conclusion as to the utterances in terms of content, effect, and motivation of the speakers. The purpose of any such declarations would be a judicial condemnation of what had been said by two Dáil Deputies. The language used by the plaintiff in his arguments was clearly to this effect: it was said that the behaviour of the Deputies 'warrants reproof' and that the Court should 'express its disapproval', as well as suggesting a need for the court to 'deplore the disobedience of the court order'. It seems to me that for a court to grant a declaration expressing its disapproval of the utterances of a deputy would cut through to the very heart of the immunity in respect of the utterances in a manner forbidden by authorities described above. Further, counsel for the plaintiff conceded that, on the logic of his arguments, he would not be confined to the remedy of declaration but would also be entitled to an injunction if a plaintiff apprehended a potential breach of a court order by a deputy in advance of any utterance taking place. Indeed, on the same logic, he would perhaps be entitled to damages. The fact that declaratory relief was sought seems

to me to be merely a device to try to soften the appearance of what in fact is being asked of the Court; the Court is being asked to take parliamentary utterances and subject them to judicial determination. Therefore, the particular form of the remedy sought in this case does not, in my view, alter the fact that what is sought, in essence, is that the Court engage with parliamentary utterances in a manner which would violate Article 15, ss. 12 and 13 of the Constitution and the separation of powers more generally.

108. The effect of any declaration would also be prospective, insofar as it might have a chilling effect on speech more generally. The submissions on behalf of the plaintiff were that the declarations sought would have the effect of "clarifying for parliamentarians the scope of what is and is not legitimate," in other words, that the only speech that might be chilled would be 'illegitimate' speech, which is not entitled to constitutional protection. It does not seem to me that a court should be involved in doing anything of that kind if it is to confine itself to its proper role under the Irish constitutional arrangements. The plaintiff argued that it was not necessary for the purpose of parliamentary debate that this kind of speech be protected, but it seems to me that the absolute terms in which the immunity in Article 15, s. 12 is expressed does not permit a court to draw dividing lines between "legitimate" and"illegitimate" speech in the Oireachtas. A further consideration is where the line would be drawn if the Court were to embark on the exercise suggested. What would trigger the Court's entitlement to intervene to grant relief in respect of parliamentary speech; would it be confined to cases where an injunction (interim or otherwise) had been granted? Would it apply where a trial was pending and there was no injunction? Would it apply from the moment a writ had issued? The plaintiff's case in this regard seemed to

shift at times, relying sometimes upon the fact of the injunction, and sometimes on the fact of the existence of proceedings. It would seem to me to be very far-reaching indeed if matters could be placed beyond the reach of parliamentary speech by the mere commencement of court proceedings against the clerk of the Dáil, leaving parliamentary speech on the particular subject potentially in abeyance for several years before the matter came on for trial.

109. The next issue for decision is whether, notwithstanding my conclusion that utterances of the Dáil deputies are not in general reviewable in the event of what would otherwise be a breach of a court injunction, there is a residual jurisdiction for the Court to intervene in an exceptional case and whether the Court should do so in the present circumstances. Such an exceptional jurisdiction was referred to in general terms in a number of cases such as *Slattery & Ors. v An Taoiseach & Ors*; *O'Malley v An Ceann Cómhairle & Ors*; *Curtin v Dáil Éireann & Ors*; and *T.D. & Ors. v The Minister for Education & Ors*, and was perhaps most memorably described in the joint judgment in *Callely* in the following terms, as previously set out above:

> "*A principle which is derived from the Constitution and intended to maintain constitutional equilibrium could not be used to subvert the order and values protected by the Constitution. Accordingly, proceedings which amounted to a fundamental departure from the dictates of the Constitution, which was neither prevented nor remedied by the Oireachtas itself then… the courts could be obliged to act to maintain the Constitutional balance."*

However, the judgment immediately added:

"*It is, however, neither necessary nor perhaps desirable to speculate on the precise circumstances in which it could be said that the principle of the separation of powers no longer required that the proceedings of the legislative power be beyond judicial scrutiny. No such case is alleged here and nor does it appear to have arisen as a matter of history since the foundation of the State. It is not to be readily assumed that such an occasion would arise in the future".*

None of the cases in which the exceptional jurisdiction was described concerned utterances in the Dail, and it is doubtful as to whether this exceptional jurisdiction applies at all in this situation. Certainly there is no authority to that effect. In any event, having regard to the terms in which this exceptional jurisdiction has been described, I am not persuaded that the present case would fall within it, even if such a jurisdiction exists with regard to utterances in the Dáil. I take this view with my eyes wide open to the fact that the utterances rendered the court proceedings almost entirely moot; that damage was undoubtedly done to the plaintiff; and that the release of the information appears to have been done in a deliberate and considered manner by the Deputies in question. This was as far from an accidental slip of the tongue on the floor of the House as one could imagine. The exceptional jurisdiction, as described by the Supreme Court, is extremely restricted and would seem to require some grave threat to the democratic order. Notwithstanding the circumstances of the present case as described, they are far from "difficult to envisage". Indeed the revealing of confidential information that is the subject of a court order is, unfortunately, an eminently foreseeable event. Potential clashes between freedom of parliamentary speech and court proceedings are specifically the subject of Standing Order 57

and the situation arising in the present case is not so unusual that it could be said to raise entirely unforeseen circumstances. The joint judgment in *Callely* cautioned against finding such an exceptional situation too readily. It seems to me that, however frustrating and infuriating the plaintiff must have found the utterances of the Deputies in the present case to have been, in circumstances where he had a court order protecting the confidentiality of the same information, and however dramatically and directly the actions of the Deputies in this case violated the usual principle of comity operating between the Oireachtas and the Courts, this was not an event of such gravity and threat to the constitutional order which would enable the Court to cross into the zone of non-justiciability created by the Constitution in respect of parliamentary utterances, even if such an exceptional power does exist in respect of parliamentary utterances.

110. In all of the circumstances, I have concluded that this Court lacks jurisdiction, whether in the ordinary way or by way of exception to the ordinary rule, to make an adjudication upon the utterances of Deputies Murphy or Doherty or to grant any declaration purporting to comment or rule upon those utterances.

The second limb of the case: the proceedings of the Committee

111. The second limb of the plaintiff's case concerned the manner in which his complaints to the Committee on Procedures and Privileges were dealt with. It will be recalled that written complaints were made on behalf of the plaintiff to the Committee following each of the Deputies' utterances disclosing information which was the subject of the interlocutory injunction. In each case, the Committee ruled that there had been no breach of the Standing Orders. The reliefs sought by the plaintiff in this context are declarations that the findings of

the Committee dated the 15th June, 2015, and the 1st July, 2015, were based on an erroneous interpretation of Standing Order 57, and additionally in Deputy Murphy's case, that a finding had been made without supporting evidence. A further claim that there was a breach of fair procedures was withdrawn at the oral hearing.

Submissions of the parties

112. The plaintiff complains that the Deputies had failed to comply with Standing Order 57 because they had not sought permission in advance of their utterances to deal with matters that were *sub judice* which, it was argued, should have been done in order to comply with the Standing Order. It was also argued that there was no evidence for the conclusion of the Committee that the Deputies had acted responsibly and in good faith, particularly having regard to the fact that the Committee did not invite or receive submissions or evidence from the Deputies themselves.

113. Again, the defendants raise a plea of non-justiciability, relying on Article 15, s. 10 together with ss. 12 and 13 of that Article, which they say have a bearing on the Committee proceedings in the present case. The plaintiffs say that the matter falls to be considered solely within the rubric of Article 15, s. 10 and that the later sections of that Article are of no relevance. Accordingly, they also argue that the Court is entitled to consider the personal constitutional rights of the plaintiff. Without prejudice to their justiciability argument, the Oireachtas defendants dispute the plaintiff's interpretation of Standing Order 57 and contest the challenge to the Committee's conclusions.

Relevant Authorities

114. The superior courts have had occasion to consider the work of Oireachtas committees of various kinds over the years in the leading cases of *Re Haughey* [1971] I.R. 217, *Maguire v. Ardagh* [2002] 1 I.R. 385, *Callely v. Moylan* [2014] 4 I.R. 112 and, most recently, in *Kerins v. McGuinness and Ors*, [2017] IEHC 34 (Kelly P., Noonan and Kennedy JJ.). Justiciability arguments were raised and carefully considered in most of those cases. In *Re Haughey*, the issue of justiciability was not explicitly discussed, but the Courts in fact proceeded to review the Committee's proceedings in a number of aspects. In *Maguire v. Ardagh*, justiciability was discussed in detail and the conclusion reached that the committee's work was reviewable by the courts. In *Callely*, justiciability was an issue in respect of which a range of divergent views were expressed, and a majority held in favour of justiciability on the facts of that particular case. In *Kerins*, the Court held that the proceedings of the Committee were not justiciable. What, then, is the dividing line between circumstances where Oireachtas committee proceedings are justiciable and those where they are not? And on which side of the dividing line does the present case fall? It is necessary to consider the authorities in some further detail to answer this question, although it has to be said that none of them involved the type of proceeding in issue in the present case, namely a committee considering the issue of whether the utterance of a Dáil deputy on the floor of the House was in breach of Standing Order 57.

115. The plaintiff sought to argue that the Court had jurisdiction to review the work of the Committee on Procedures and Privileges because it was a proceeding which impacted upon, or "affected" the rights of, a person who was not a member of the Houses of the Oireachtas and therefore the Committee's proceedings did not concern purely internal Oireachtas matters. The defendants argued that the

Committee's work was fundamentally intertwined with freedom of parliamentary speech because it involved an assessment of and adjudication upon a parliamentary utterance, and further, that the plaintiff's reputation was not directly affected by the Committee's proceedings; rather, his status was that of complainant, whose complaint had led to the initiation of the proceedings in respect of members, but that the members were the only persons whose conduct or reputation could be the subject of an adverse decision by the Committee.

116. In *Re Haughey* [1971] I.R. 217, part of the case was concerned with various challenges to aspects of the Public Accounts Committee's jurisdiction and proceedings, including whether the Committee had jurisdiction to examine the Red Cross monies (as distinct from the grant-in-aid monies), whether Standing Order 127 had been adopted under the 1937 Constitution, whether the Committee had the power to administer an oath, whether the Chairman's certificate to the High Court was valid and the procedures involving the taking and testing of evidence before the Committee itself. No argument was made that the matters in issue were non-justiciable and the matter does not feature explicitly in the judgment. It is perhaps fair to say that justiciability was assumed or implicitly ruled as being present, since the Court did in fact proceed to rule on each of those matters. That was of course in the context where the Committee had heard serious allegations in respect of Mr. Haughey to the effect that he had paid money to the Chief of Staff of the IRA and was involved in arrangements connected with arms importation for the IRA. As O'Dalaigh C.J. put it (at page 262), "he had been accused of conduct which reflected on his character and good name…" and "the true analogy is not that of a witness but of a party. Mr. Haughey's conduct is the very subject-matter of the Committee's examination

and is to be the subject-matter of the Committee's report" (at page 263). Or, as Fitzgerald J. put it at page 266, he "had the character of an accused person, rather than that of a mere witness as to fact." It was also a crucial feature of the Committee's proceedings that by virtue of s. 4(3) of the Committee of Public Accounts of Dáil Éireann (Privilege and Procedures) Act, 1970, a failure to answer questions by a witness could be certified to the High Court where it would be dealt with as a contempt of court.

117. The issue of justiciability was extensively argued and comprehensively addressed in the judgments in *Maguire v. Ardagh*. The committee in question was an Oireachtas sub-committee established to investigate the shooting dead of a man in Abbeylara, County Longford, by members of An Garda Síochána. An important characteristic of the Abbeylara sub-committee was that it had the power to compel witnesses, having received consent from the compellability committee pursuant to s. 3 of the Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act, 1997. The applicants were members of An Garda Síochána who had been directed to attend before the sub-committee for questioning about the shooting. A further important feature was that it was a fact-finding inquiry, even to the extent that the Committee claimed to be entitled to make a finding as to whether or not the Gardaí in question were guilty of unlawful killing. One of the primary issues was whether the Oireachtas had an inherent power under the Constitution to establish an inquiry of this nature. The Supreme Court ultimately granted a declaration that:

"the conducting by the sub-committee of an inquiry into the fatal shooting at Abbeylara on the 20th April, 2000, capable of leading to adverse findings of fact and conclusions (including a finding of unlawful killing) as to the personal culpability of an individual not a member of the Oireachtas so as to impugn his or her good name was *ultra vires* in that the holding of such an inquiry was not within the inherent powers of the Houses of the Oireachtas".

118. In the course of her judgment, McGuinness J. addressed the submission that internal Oireachtas committee proceedings were non-justiciable by reason of Article 15, s. 10. She accepted that they would be non-justiciable in most cases, but that the situation was different in the present case by reason of the particular features of the Abbeylara Sub-Committee:

"It is clear from this sub-article that, as submitted by counsel for the applicants, the Oireachtas "makes its own rules for its own members". These rules are in the main set out in the standing orders of both Houses. Various committees of each House administer these rules and may provide for penalties for their breach. Committees such as the Committee on Procedure and Privilege and the Committee of Selection are long established and are known as standing committees. In recent years another such standing committee has been established - the Committee on Members' Interests of Dáil Éireann. All these Committees, all investigations carried out by them and all penalties imposed by them (or by the Dáil or Seanad at their instigation) concern solely the members of the Oireachtas themselves. *There is no doubt but that all these matters are non-justiciable in accordance with Article 15.10.*

Can this non-justiciability extend to actions of the Oireachtas, its committees and its members *when those actions impinge on the rights of persons who are not members of either House*, as contended for by counsel for the sub-committee and Deputy Shatter? More particularly, can non-justiciability extend to a situation *where such persons are compelled to attend and give evidence* before a committee of either House or a joint committee? Could such non-justiciability extend to a situation where, for instance, the members of a committee were in blatant breach of the standing orders of the House itself and that breach affected *the rights of non-members*? It seems to me that it could not.

The members of the sub-committee, including Deputy Shatter, argued that such an affected person must seek his or her remedy not through the courts but "through the political process". I am not entirely clear what this latter phrase would mean in practice. In my view it is neither a practical nor an effective remedy.

In the context of the present case, however, it is not necessary to hold that all actions of the Oireachtas which impinge on the rights of non-members are justiciable. The applicants have been directed to attend, to give evidence and to produce documents before the Abbeylara sub-committee under the provisions of the Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act, 1997. This Act specifically and openly involves the High Court (and on appeal this court) in the proceedings of Oireachtas committees." (emphasis added)

McGuinness J referred to s. 3, subs. (7) and (8) of the 1997 Act which provide for application to the High Court in the event of disobedience of a Committee direction and for offences resulting from disobedience to directions and continued:-

> "A person such as one of the applicants, therefore, who appears before an Oireachtas committee under a direction pursuant to the Act of 1997, is thus involved in a scenario where crucial decisions are to be made by the High Court, or by this court on appeal. *He is at risk of being found to have committed an offence and of being fined or committed to prison. He is brought into this scenario as a result of resolutions, motions, amendments and other actions of the Oireachtas. It seems to me that actions of the Oireachtas which are the basis on which the ordinary citizen may be brought into such peril cannot be non-justiciable.*" (Emphasis added).

In the same case, Geoghegan J. said:

> "First of all there is the question of justiciability. While it is true that out of respect for the separation of powers the courts will not interfere with *the internal operations of the orders and rules of the Houses in respect of their own members, the non-justiciability principle stops there. If there is some essential procedural step which a house of the Oireachtas or a committee thereof has to take before rights of an outsider, that is to say a non-member of the House can be affected,* then at the suit of that outsider the courts can give relief if that essential step is not taken. Broadly speaking, that is the view of the Divisional Court and I agree with it." (Emphasis added).

In the same case, Keane C.J. said:

"These extensive immunities and privileges, denied to citizens who are not members of the Houses of the Oireachtas, are an important feature of the parliamentary democracy established under the Constitution. Neither these provisions, however, nor any other provision of the Constitution expressly exempt from scrutiny by the courts the actions of the Oireachtas or its individual members save to the extent specified in Article 15.12 and 13.

That is not to say that the courts will accept every invitation to interfere with the conduct by the Oireachtas of its own affairs: such an approach would not be consistent with the separation of powers enjoined by the Constitution. Specifically, the courts have made it clear that they will not intervene in the manner in which the House exercises its jurisdiction under Article 15.10 to make its own rules and standing orders and to ensure freedom of debate, where the actions sought to be impugned do not affect the rights of citizens who are not members of the House: see the decision of this court in *Slattery v. An Taoiseach* [1993] 1 I.R. 286. It was also held by the former Supreme Court in *Wireless Dealer Association v. Minister for Industry and Commerce* (Unreported, Supreme Court, 14th March, 1956), that the courts could not intervene in the legislative function itself: their powers to find legislation invalid having regard to the provisions of the Constitution arise only after the enactment of legislation by the Oireachtas, save in the case of a reference of a Bill by the President to this court under Article 26. Nor, in general, will the courts assume the role exclusively assigned to the Oireachtas in the raising of taxation and the distribution of public resources, as more recently made clear by this court in *T.D. v. Minister for Education* [2001] 4 I.R. 259.

….Different considerations apply however, where, as here, the Oireachtas purports to establish a committee empowered to inquire and make findings on matters which may unarguably affect the good name and reputations of citizens who are not members of either House. An examination by the courts of the manner in which such an inquiry is established in no way trespasses on the exclusive role of the Oireachtas in legislation. Nor does it in any way qualify or dilute the exclusive role of the Oireachtas in regulating its own affairs.

Even if there were no authority to guide this court on this issue, I would, accordingly, be satisfied that, as a matter of principle, the Divisional Court was correct in holding that these issues were justiciable. The matter, is however, put beyond doubt, in my view, by the decision of this court in *In re Haughey* [1971] I.R. 217.

As I have already pointed out, in his judgment Ó Dálaigh C.J. expressly found at p. 257 that:-

> 'the examination of the expenditure of monies belonging to the Irish Red Cross Society, not being monies granted by the Dáil to meet public expenditure, is not a matter which, as such, falls within the jurisdiction of the Committee of Public Accounts.'

Such a finding was plainly irreconcilable with any view on the part of the former Chief Justice that this was not a justiciable issue. Similarly, as the Divisional Court pointed out, Ó Dálaigh C.J., in another part of his judgment, expressed the view that the committee in that case was not legally entitled to an answer to any question which was not relevant to the proceedings and

which was not within its terms of reference. Similarly, his judgment considered the powers granted to the Committee of Public Accounts under a specific standing order and the validity of what purported to be a certificate of the committee having regard to its terms of reference. I have no doubt that the Divisional Court were correct in holding that the decision *In re Haughey* [1971] I.R. 217 conclusively disposes of the claim made on behalf of the sub-committee in the present case that, subject to the qualifications already referred to, the issues raised in these proceedings were not justiciable."

119. In *Howlin v. Morris* [2006] 2 I.R. 321, which was not itself a case concerning the work of a Committee, but rather concerned an order for discovery made by the Morris Tribunal in respect of a Deputy's telephone and facsimile records, Hardiman J., while discussing Article 15 of the Constitution, said:

"The text of the Article nowhere envisages that a person or body outside the Oireachtas will exercise the powers conferred on that body. There is no precedent of which I am aware in which a court has actually exercised a power which the Constitution has conferred on the Oireachtas or either House thereof. Indeed, this court has several times declined to interfere in "the internal machinery of debate of the House" because this is "within the competence of Dáil Éireann to deal with exclusively, having regard to Article 15.10 of the Constitution" (see O'Malley v. An Ceann Comhairle [1997] 1 I.R 427, per O'Flaherty J.). *On the small numbers of occasions when the courts have been prepared to supervise the orders or procedures of an Oireachtas body, it has been at the suit of non-members whose rights were affected*: see

In re Haughey [1971] I.R. 217 and *Maguire v. Ardagh* [2002] 1 I.R. 385. This is a vital distinction, as Keane C.J. said in the latter case, at p. 538."

Hardiman J. then quoted from the judgment of Keane C.J., which quotation has already been set out above.

120. In the most recent case involving the work of an Oireachtas Committee, *Kerins v. McGuinness and Ors*, [2017] IEHC 34 (Kelly P., Noonan and Kennedy JJ.), the Court in holding the plaintiff's challenge to proceedings before the Public Accounts Committee to be non-justiciable, laid heavy emphasis on the voluntary nature of the plaintiff's attendance before that Committee:

"When Ms. Kerins attended before the PAC, she did so voluntarily. It has been argued on her behalf that her attendance was not in reality voluntary. She had no choice but to attend, or as described by her counsel, it was "Hobson's choice". If she chose not to attend, she risked being publicly criticised for failing to do so. Ms. Kerins may have felt compelled to attend for myriad reasons. These could, for example, have included defending the commercial interests of Rehab and answering criticisms publicly levelled against her in the media.

For the same reasons, she may have felt unable to refuse to answer questions that she considered unfair and outside the PAC's remit. She may have felt that she could not walk out without incurring the wrath of the PAC and attendant media. All of these things may well be true. However, none can alter the undisputed fact that she was under no legal compulsion to attend, to answer questions or to remain if she did not wish to. Her attendance was purely voluntary in the legal sense and was not secured by the exercise of any legal

power by the PAC. Had she chosen not to attend, as did her predecessor Mr. Flannery, or having attended not to answer certain questions or indeed to walk out at any stage, the PAC was legally powerless to prevent her doing so.

Had the PAC been granted compellability powers by the CPP, then the situation would have been significantly different. She would have been obliged to attend as a matter of law and to answer such questions as were within the remit of the PAC. A refusal could incur a legal sanction. Of course none of that arose because compellability powers were refused on the basis that prospectively, the PAC had no power to enquire into payments made by Rehab, as the CPP determined.

This is of critical importance to the claim of Ms. Kerins which makes jurisdiction the centrepiece of her case. However it seems to us that in reality, the issue of jurisdiction, when properly analysed, simply does not arise because none was being exercised. This is what distinguishes this case from *Haughey* and *Abbeylara* where the court's jurisdiction was engaged by virtue of the adjudicative and determinative processes being undertaken in those cases pursuant to powers purportedly vested in the relevant committees."

of the compulsory nature of the Committee's proceedings."

121. In *Kerins*, the Divisional Court also held that the immunity covering utterances on the floor of the Houses also applies to utterances in Committee proceedings:

"Counsel for the applicant submitted that while Article 15.13 applied to utterances "in either House" this was a reference to the chamber of the House,

rather than to a committee of either or both Houses. In Professor Casey's article, approved in the joint judgment, he offers the following view:

> 'Article 15.13 is also regarded as covering utterances in official Oireachtas Committees, whether established by one House or jointly by both; this is on the basis that any such committee is essentially the alter ego of the House which established it and must consequently share the privileges of that House. The position has now been clarified by the committees of the Houses of the Oireachtas (Privilege and Procedure) Act 1976. This Act applies to Committees appointed by either House or jointly by both. It provides that a member of either House shall not, in respect of any utterance in or before a committee, being amenable to a court or authority other than the House or Houses by which the Committee was appointed; section 2(1).'

Section 2(1) of the 1976 Act is a direct analogue of s. 92 of the 2013 Act above referred to. In *Attorney General v. Hamilton (No. 2)*, Geoghegan J. speaking of the immunity provided by the 1976 Act said (at p. 253):

> 'Hamilton P. in his ruling notes that the Oireachtas itself considered that the privileges contained in ss. 10, 12 and 13 of Article 15 related only to official reports and publications of the Oireachtas or of either House and utterances made in either House because it caused to be enacted the Committees of the Houses of the Oireachtas (Privilege and Procedure) Act, 1976. I think it equally likely that the Oireachtas simply had a doubt about the matter and for safety enacted that Act. It is interesting that the Act follows precisely the wording of the

> Constitution. In my view s. 13 would probably have covered utterances before committees of Houses of the Oireachtas irrespective of whether the Act of 1976 had been passed or not.'
>
> It seems to us that, consonant with the views of Professor Casey and Geoghegan J., s. 92 of the 2013 Act is merely declaratory of the position that already obtained under Article 15.13, namely that the privilege applies to committees of either House in the same way as it applies to the Houses themselves."

The Divisional Court concluded as follows:

> "While Ms. Kerins' case is couched in largely jurisdictional terms, as we have explained, we do not believe that the issue of jurisdiction is one that properly arises in these proceedings at all. In order to make that case, Ms. Kerins asserts, as she must, that the utterances complained of amount to some form of adjudication or determination. True it is that some of the Oireachtas respondents express themselves in terms which suggest that conclusions were being arrived at by the individuals concerned. In reality however, these were clearly expressions of opinion by the relevant members devoid of any legal force."

122. As already set out earlier in this judgment, the Court in *Kerins* went on to say that the Court was not entitled to review utterances of members made in a parliamentary Committee which were protected by Article 15, s. 13 as this would be to render them 'amenable' to the jurisdiction of the court. The Court said that it was not entitled to analyse the utterances in terms of tone or content, or to test them for bias, propriety or more.

123. Having regard to the above judgments, it seems to me that the Committee proceedings and conclusions sought to be impugned in the present case are clearly distinguishable from those which were under consideration in *Re Haughey* and *Maguire v. Ardagh.* Further, the emphasis in *Kerins* on the voluntary nature of the plaintiff's attendance before the Public Accounts Committee, which was the keystone of the Court's view that the matter was non-justiciable, is instructive. In the present case, the plaintiff has not been brought by compulsory process before an Oireachtas committee where his good name stands to be adversely affected by an adjudication or determination of the Committee in respect of certain facts. He is not 'before' the Committee at all. He is a 'non-member' whose complaint has led to Committee proceedings in respect of the utterances of two members of the Dáil. Insofar as any determination could be and was made by the Committee, it was in respect of the conduct of the member, not that of the plaintiff non-member. His interests, to use a somehow loose term, in the conduct and outcome of the Committee proceedings were indirect rather than direct and very different in quality from the interests of Mr. Haughey and the Gardai in *Maguire v. Ardagh*.. When he made his complaint, he sought a form of vindication from the Committee for something that had already happened; a condemnation by the Committee of the Deputies utterances, which are said to have caused the damage to him. No personal right of his own, whether good name or other right, fell to be adjudicated upon by the Committee. He was not brought by compulsory process before a Committee; no facts which could adversely impact upon his reputation fell to be adjudicated upon by the Committee. Taken at its height, his position *vis a vis* the Committee was that of a non-member whose rights of access to the Courts had already been interfered

with by the utterances of Deputies and the best that the Committee could do, from his point of view, was to condemn what had happened. This stands in stark contrast to the situation in the *Re Haughey* case where Mr. Haughey stood at risk of a finding that he had been involved in arms importation with the IRA and the Gardaí in *Maguire v. Ardagh,* who stood in peril of a finding that they had killed a man unlawfully. Accordingly, the essential features of the plaintiff's situation can be readily distinguished from those presenting in *Re Haughey* and *Maguire v. Ardagh*.

124. It is a little more complex to assess the impact of the *Callely* case upon the justiciability issue arising in the present case. Crucially, the proceeding being carried out by the Committee on Members' Interests of Seanad Éireann in that case was done, not only under the auspices of Article 15, s. 10 of the Constitution but also pursuant to the Standards in Public Office Act, 2001 and the Ethics in Public Office Act, 1995. The positions of the various judges in relation to the justiciability issue in that case have been noted earlier in this judgment. To repeat; a majority of four (Murray, Hardiman, McKechnie and Fennelly JJ.) held that issues relating to the work of the Committee were justiciable, while a minority (Clarke, O'Donnell JJ. and Denham C.J.) took the view they were non-justiciable. Fennelly J., who in a sense had the 'swing' vote on the issue of justiciability, would have found the proceedings non-justiciable had it not been for the legislative basis for the Committee's work in that case. This key differentiating feature, namely the absence of any legislative basis for the Committee's proceedings in the present case, supports the view that the outcome in the present case should be one of non-justiciability, applying the views of a majority of the judges (Clarke, O'Donnell JJ., Denham C.J., and Fennelly J.) on

the justiciability of an Article 15, s. 10 inquiry which neither has a legislative basis nor falls within the *Haughey-Abbeylara* principle. On that basis, the present proceedings must be considered non-justiciable.

125. Indeed, although Murray, Hardiman and McKechnie JJ. held that Article 15, s. 10 does not contain any ouster of jurisdiction, and appear to have taken the view that all Article 15, s. 10 inquiries are justiciable, some of the comments in their judgments lay considerable emphasis on the precise nature of the inquiry in that case, namely an adjudication on a member's expenses. The present case concerns adjudication on a member's utterances in the Dáil, a matter which is intimately connected with the core value of freedom of speech in parliament. This is a very different scenario from that which arose in *Callely* and it is not entirely clear to me whether the judgments of Murray, Hardiman and McKechnie JJ. can necessarily be read as supporting the view that the present type of inquiry would be justiciable, notwithstanding their broad comments to the effect that inquiries conducted pursuant to Article 15.10 are justiciable.

126. In any event, having regard to the views of Clarke J., O'Donnell J., Denham C.J., and Fennelly J. in *Callely*, it seems to me clear that the present committee proceedings are non-justiciable and indeed, that the case for non-justiciability is considerably stronger in the present case than it was in an 'ordinary' Article 15, s. 10 inquiry by reason of the close connection between the work of the Committee and the status of utterances under ss. 12 and 13 of Article 15. The Committee on Procedure and Privileges in the present case was reviewing and ruling upon the Deputies' utterances in the Dáil itself; if this Court were to review and rule upon the Committee's work, it would, in my view, be

inevitably drawn into adjudicating on questions relating not only to the content of the utterances but also questions as to the motivation of the speakers. This is clear, for example, from the fact that the Court has been invited to determine that the Committee erred in reaching the conclusion that the Deputies acted in good faith. Judicial scrutiny of parliamentary utterances to discern the Deputies' motivation is precisely the kind of exercise that should not be engaged upon, according to *Ahern v. Mahon,* and it seems to me that judicial scrutiny of the Committee's ruling on this precise matter must be equally prohibited. It seems to me that it would be artificial to set ss. 12 and 13 of Article 15 to one side when considering an inquiry under Article 15, s. 10, which involves an adjudication upon parliamentary utterances. The two matters are inextricably linked; it is an internal inquiry concerning utterances. The door with respect to justiciability is, in my view, not only closed but double-locked; first, because it is an internal inquiry pursuant to Article 15.10, and secondly, because it concerns utterances protected by both Articles 15. 12 and 15.13.

127. Further, the Court in *Kerins* has made it clear that utterances and reports of Committees also fall within the immunity of Article 15, s. 13, provided they do not fall within the *Haughey-Abbeylara principle*. That being so, it is difficult to see how the Court could possibly have jurisdiction to pass judgment upon the Committee's conclusions.

128. It follows that I consider all of the issues raised in relation to the Committee proceedings to be non-justiciable and in the circumstances, I think it would be inappropriate to express views on the individual complaints made in

respect of the Committee's interpretation of the Standing Orders or its conclusions on the plaintiff's complaints.

Liability of the State

129. Finally, the Plaintiff sought to argue that, even if the Court found that the Oireachtas defendants were immune from liability in these proceedings by reason of the provisions of Article 15, the State, named as the twelfth defendant in the proceedings, was nonetheless liable for the damage caused to the plaintiff for failure to vindicate his personal rights. It was stated in the written submissions that "the State is responsible for ensuring that the Oireachtas does not interfere with the functions of the Courts in their purely judicial domain." I am somewhat at a loss to understand which particular organ of the State is supposed to be under the duty to somehow force Oireachtas members not to interfere with the courts. In any event, it seems to me that the decision in *Kemmy v. Ireland & Anor.* [2009] I.R. 74 does not support the plaintiff's case, as suggested. In that case, it was held that the State was not liable in damages, on the principle of vicarious liability, for acts of judges carried out either within or without jurisdiction, as a corollary of the principle of judicial independence. It seems to me that, by analogy, if a Dáil deputy makes utterances in the Dáil and this is protected by Article 15, there can be no vicarious liability on the basis of damage alleged to have been done by those utterances. In constitutional terms there is no 'harm' to be remedied. In *Kemmy*, the Court also discussed an alternative basis of State liability, being a form of liability based on a direct duty to its citizens (rather than vicarious liability through the actions of judges) in a situation where the State had failed in its duty to provide the 'scaffolding' within which judges could perform

their duties. Perhaps such an extreme situation might arise if the Oireachtas had no rules or procedures whatsoever for dealing with utterances and matters *sub judice*. However, there is a Standing Order dealing with the *sub judice* rule and there was a hearing by the Committee on Procedure and Privileges in respect of the plaintiff's complaint. The real grievance of the plaintiff is not that the State failed to provide adequate 'scaffolding' but that he disagrees with the decision of the Committee made within the architecture established. This is very far from falling within the type of situation where it could be said that the State might be liable under the *Kemmy* 'direct liability' view.

The Parliamentary remedy

130. The separation of powers under the Irish Constitution involves a distribution of governmental power across three branches of the State in which there are certain inevitable points of tension as between the different organs. It has been noted that the three branches are not "hermetically sealed" and that there are "points of intersection, interaction and occasional friction" (*per* O'Donnell J., *Pringle v. Ireland* [2013] 3 IR 1 at 110). However, in establishing the complex architecture of the separation of powers in the Irish Constitution, the framers of the Constitution made certain choices, and one of those was to create a strong set of privileges and immunities for parliamentary speech. The language used to describe those privileges and immunities, in my view, signals the importance with which freedom of speech in the Oireachtas, and therefore in the Irish democratic state, was viewed and I have reached the conclusion that none of the issues in the present case are justiciable in the courts.

131. However, there is no doubt that the impact of parliamentary speech can potentially be damaging and dangerous to individuals the subject of the utterances. We have already seen the facts of *A v. United Kingdom*, in which a woman and her children were hounded from their home and subjected to vile abuse as a result of a parliamentary utterance. The plaintiff in the present case offered evidence to the court which granted him the interlocutory injunction as to the damage that would be caused by the revelation of his private banking details. One can readily imagine hypotheticals, such as, for example, the impact of the identification in the Dáil or Seanad of a person charged with a serious sexual offence who is legally entitled to anonymity during court proceedings and who is subsequently acquitted. One can produce many other hypothetical examples of the potential damage, hurt and danger that could be caused to persons by reason of the revealing in public of deeply sensitive personal information of various kinds. However, my understanding of the Irish constitutional provisions is that the Courts simply do not have a role in policing parliamentary utterances except, perhaps, in some extremely exceptional and limited circumstance of which the present case is not one. As McKechnie J said in *Callely*, having referred to the "enormity of the immunities" in Article 15, ss. 10, 12 and 13, "their exercise may have the potential of inflicting grave damage and creating even life threatening consequences for third parties who, despite the circumstances, must remain without legal redress as the justice system is left powerless to intervene."

132. However, in *Callely*, it was also said in the joint judgment of O'Donnell and Clarke JJ.:

> "The fact that there cannot be immediate recourse to the courts places, if anything, a heavier onus on the Oireachtas to ensure that constitutional rights are respected in proceedings which are themselves non-justiciable."

The materials presented to the Court in this case included reports from the United Kingdom and New Zealand in which there was discussion of these problems as well as potential solutions by way of reform of parliamentary procedures. These demonstrate that the issues raised by the present case are not unique and flow from but one example of the potential difficulties that can arise where members of the Houses of the Oireachtas consider that there is a public interest in disclosing confidential information that is the subject of court proceedings. For example, in the 2009 Report of the Privileges Committee of the New Zealand Parliament entitled "Question of privilege relating to the exercise of the privilege of freedom of speech by members in the context of court orders", it was noted that the issue of parliamentary speech encroaching on court orders had arisen four times between 1988 and 1999. The report recommended that the 'comity principle' should be explicitly set out in the parliamentary rules and, among other things, that there should be a specific procedure as to the exercise of the Speaker's discretion as well as guidance as to how that that discretion might be exercised, as well as provision for expunging material which was the subject of a court order from the official record. It may be that that the present case throws a light on the need for a general examination of this area by a Committee of a similar type in Ireland which would take into account a wide variety of factors and would not be confined to the facts relating to a particular case. Such a review might consider issues such as whether and when a Dáil deputy may discuss matters which are before the courts and, in particular, reveal matters that are the

subject of an injunction as to confidentiality, as well as what steps a deputy should take if he or she proposes to do this, what the role of the Ceann Comhairle is if an apprehended breach of the *sub judice* rule is brought to his or her attention, and how the Dáil Committee on Procedures and Privileges should deal with such an event if it takes place. While the Court has declined to enter upon an analysis concerning the parameters laid down by Standing Order 57, I think it might not be inappropriate to say at the most general level that there seems be at least some ambiguity and lack of clarity as to procedures and parameters concerning speech potentially trenching on *sub judice* matters. However, in my view, having regard to the provisions of Bunreacht na hÉireann and the authorities discussed, while any such discussion as to the future of the *sub judice* Standing Order could be progressed in the public arena and within the Houses of the Oireachtas, it cannot proceed further in this Court. Judicial intervention in this area would not constitute the restoration of a constitutional equilibrium disrupted by the parliamentary utterances, but would itself constitute a disruption of the equilibrium established by our Constitution. If there is to be a signal sent out to prevent future revelations in the Dáil of private information or material the subject of injunctive relief granted by a court to an individual citizen, any such signal must come from the court of public opinion and the Houses of the Oireachtas, but not from the courts of justice. This is, in my view, what Article 15 of the Constitution clearly says.