

BETWEEN

IRISH MEDICAL ASSOCIATION AND GABRIEL BEECHAM

PLAINTIFFS

AND

HEALTH SERVICE EXECUTIVE, THE MINISTER FOR HEALTH AND THE MINISTER FOR EXPENDITURE AND LAW REFORM

DEFENDANTS

JUDGMENT of Mr. Justice Paul Gilligan on the 16th day of February, 2017

1. The plaintiffs in these proceedings seek a number of reliefs by way of declarations and damages arising out of a settlement agreement dated 22nd day of January, 2010 arising from previous proceedings involving the first named plaintiff and the first named defendant. The present proceedings rely on the aforesaid settlement and essentially the issue between the parties relates to the payment of a living out allowance to non-consultant hospital doctors and the plaintiffs allege that the defendants are in breach of the aforementioned settlement agreement as a result of which new entrant non-consultant hospital doctors have not received the requisite living out allowance as set out in contracts signed by them which include and allow for the payment of a living out allowance which payments ceased in or around February, 2012.

2. The defendants have delivered a full defence and deny any liability to the plaintiffs.

3. An order of this Court directed discovery of a variety of documents by the defendants and arising out of that order and compliance therewith an issue has arisen as regards two documents whereby the defendants maintain that the documents are not discoverable as they very strictly attract public interest privilege and privilege pursuant to Article 28 of the Constitution as per the Supreme Court decision in *Attorney General v. Hamilton* [1993] 2 I.R. 250.

4. The two documents in question are:-

(i) A draft memorandum for the Government review of public service allowances and premium pay as dated 10th day of July, 2012;

(ii) Original email attaching Memorandum for Government review of public service allowances and premium pay as dated the 30th day of August, 2012.

The sole issue for determination is as to whether or not the two documents are subject to privilege and accordingly not subject to production.

5. Mr. Cush on the plaintiffs' behalf contends that the claim in the first instance for absolute privilege is made pursuant to the 17th Amendment to the Irish Constitution as inserted by way of a new Article 28.4.4 which states as follows:-

"The confidentiality of the discussions at meetings of the Government shall be respected in all circumstances save only where the High Court determines that disclosure should be made in respect of a particular matter –

(i) In the interests of the administration of justice by a court or

(ii) By virtue by an overriding public interest pursuant to an application in that behalf by a Tribunal appointed by the Government or a Minister of the Government on the authority of the Houses of the Oireachtas to inquire into a matter stated by them to be a public importance.

6. It is contended on the plaintiffs' behalf that the law in relation to Cabinet confidentiality extends to everything that happens at Cabinet in terms of the discussion that lead to a decision. The plaintiff accepts that once a decision is made that is a matter of public record and at that stage discovery can be obtained of a document that evidences the decision taken. It is contended on the plaintiffs' behalf that discovery of a document cannot be obtained if the document evidences the discussion that leads to the decision but that the privilege of cabinet confidentiality does not extend to documents that were prepared for the discussion.

7. In so far as it is claimed by the defendants that the documents in issue are not subject to discovery as they are privileged pursuant to Article 28.4.4 or alternatively pursuant to a public interest claim, it is the plaintiffs' submission that the onus is on the defendants to make out this claim.

8. The documents in question were prepared for government on the 10th July, 2012, and the 3rd day of August, 2012, and the relevant decision was taken on the 18th September, 2012. It is the plaintiffs' case that on the basis of the 17th Amendment to the Constitution there cannot be any claim of absolute confidentiality as this privilege could only be claimed at meetings of the government.

9. It is the plaintiffs' contention that the law in relation to cabinet confidentiality only extends to everything that happens at cabinet in terms of the discussions that lead to a decision. It is noted by the plaintiffs that once a decision is made it is a matter of public record and discovery of a document that evidences such a decision may be sought. It is the plaintiffs' case that one cannot claim privilege over a document that evidences the discussion that leads to the decision but that privilege of cabinet confidentiality does not extend to documents that were prepared for this discussion. It is questioned on the plaintiffs' behalf whether any view of a minister that is expressed and relates to a decision that might be made months away could be privileged. It is contended that this would be an extension of public interest privilege.

10. Mr. Cush expanded on the two authorities relied upon by the defendants namely *Ambiorix v. Minister for the Environment* (No.1) [1992] 1 IR 277 and *Attorney General v. Hamilton*.

11. In *Ambiorix v. Minister for the Environment* the trial judge had ordered discovery of the documents and memoranda which had

come into existence for the purpose of reaching a cabinet decision. Counsel for the defendants challenged this decision on the grounds of cabinet confidentiality in that disclosure could prejudice the operation of the government. It is advanced by the plaintiffs that this case is exactly on point as it refers to a memorandum for government. The Supreme Court held:-

"1. That the law relating to claims of executive privilege on the grounds of public interest was correctly stated in *Murphy v. Corporation of Dublin* [1972] I.R. 215.

2. That, under the Constitution of Ireland, 1937, the administration of justice was committed solely to the courts and, therefore, any conflict between the public interest in the production of evidence and the public interest in the confidentiality of documents relating to the exercise of the executive power fell to be decided by the courts.

3. That the decision of the Supreme Court in *Murphy v. Corporation of Dublin* [1972] I.R. 215 was based on fundamental constitutional principles which did not apply to decisions made by the courts of other jurisdictions.

4. That the Executive could not prevent the courts from examining documents relevant to any issue in a civil trial for the purpose of deciding if they should be produced in evidence but that there was no obligation on the courts to examine any document and a claim of privilege could be upheld by the courts merely on the basis of a description of the nature or contents of a document.

5. That no class of document was exempt from production by reason of the rank of the public servant creating it or the identity of the person for whom it was intended.

6. That, once a court was satisfied that a document was relevant, the onus of proof lay on the party claiming the privilege to show why it should not be produced in evidence.

7. That the ability of an individual to exercise his right to challenge decisions of the Government was dependant on his right to avail of court procedures including those relating to discovery.

8. That any party to an action who obtains production of documents by discovery was prohibited from making use of those documents except for the purposes of that action and it was an inherent jurisdiction of the courts to regulate the production of documents to prevent the infringement of this restriction.

9. That, consequently, those documents which constituted representations made by third parties to the government in the belief that such correspondence was confidential would be disclosed to the lawyers acting on behalf of the plaintiffs only on the undertaking that they would not reveal their contents to their clients without special leave of the trial court."

12. It is contended on the plaintiffs' behalf that based on paragraph 5 that any argument as to the seniority of a civil servant, should not be considered. Such an argument however was not advanced in the present case. It is further contended by the plaintiffs that based on paragraph 6 that the document is relevant as it was discovered in the defendants' affidavit. It was the memorandum for government leading to the relevant decision in the proceedings. The onus is on the defendant to satisfy a claim of privilege. It is the plaintiffs' case that the defendants are in error in confusing documents at cabinet which are clearly privileged with a prior document prepared for the government which is not privileged as demonstrated in *Ambiorix*.

13. Mr. Cush referred to the judgment of Finlay C.J in *Attorney General v. Hamilton* which found the principles in *Murphy v. Corporation of Dublin* to be the correct statement of law:-

"1. Under the Constitution the administration of justice is committed solely to the judiciary by the exercise of their powers in the courts set up under the Constitution.

2. Power to compel the production of evidence (which, of course, includes a power to compel the production of documents) is an inherent part of the judicial power and is part of the ultimate safeguard of justice in the State.

3. Where a conflict arises during the exercise of the judicial power between the aspect of public interest involved in the production of evidence and the aspect of public interest involved in the confidentiality or exemption from production of documents pertaining to the exercise of the executive powers of the State, it is the judicial power which will decide which public interest shall prevail.

4. The duty of the judicial power to make that decision does not mean that there is any priority or preference for the production of evidence over other public interests, such as the security of the State or the efficient discharge of the functions of the executive organ of the Government.

5. It is for the judicial power to choose the evidence upon which it might act in any individual case in order to reach that decision."

14. Mr. Cush further referred to the finding of Walsh J. in *Murphy v. Corporation of Dublin* wherein the production of documents could be a danger to the security of the State. In the present proceedings no such threat exists.

15. Relying on *Ambiorix v. Minister for the Environment* Mr. Cush submitted that if documents were not absolutely privileged the nature and character of the documents should be looked at. It was contended that the public interest involved in their production for the purposes of the litigation before the court in this case clearly outweighed any harm that might arise to the executive organ of the Government by the disclosure of the documents.

16. It was submitted by the plaintiffs' that the decision in *Attorney General v. Hamilton* which is relied on by the defendants, was delivered prior to the constitutional amendment. This case was based on a question relating to events at a government meeting. Mr. Cush outlined the findings of the Supreme Court as follows:-

"In allowing the appeal and granting the reliefs sought, (unanimously),

1. That the Attorney General had a clear standing and duty to enforce the Constitution whether on behalf of individual or otherwise unprotected rights or in a claim of public right, or otherwise.

2. That the express provisions of Article 28 requiring the Government to meet and act as a collective authority and the collective responsibility for acts and decisions of the Government and of Departments of State thereby imposed required as an inevitable adjunct the need for and frank discussion between members of the Government prior to the making of decisions and the complete confidentiality of those discussions.

3. That notwithstanding the absence of any express words in the Constitution itself providing for such confidentiality, the separation of powers envisaged under Article 6 and interpreted as a doctrine in some detail by the courts, warranted such a finding of absolute confidentiality of cabinet discussions prior to decisions.

4. That such an interpretation was not inconsistent with the express words of Article 26, s. 2, sub-s. 2 and Article 34, s. 4, sub-s. 5 of the Constitution (prohibiting disclosure of separate or dissenting opinions in the Supreme Court in certain circumstances) given the origins of such provisions by way of legislative amendment shortly after the coming into force of the Constitution.

5. That earlier decisions of the courts on the disclosure of documents to the courts as the judicial power and the ultimate arbiters of conflicting public interests affected by such disclosure could not affect confidentiality as a necessary concomitant of cabinet government within the framework of the Constitution.

6. That on analysis of the constitutional provisions dealing with the relationship of the executive to the legislature, and noting that the rule of cabinet confidentiality was respected by the standing orders and practice of both Houses of the Oireachtas, the sanction for accountability resided in a motion of no confidence in the Government as a collective unit perhaps precipitating a general election, rather than permitting some external body to look into its discussions.

7. The rule of confidentiality was a constitutional right going to the fundamental machinery of government and was not capable of being waived by any individual member of a government nor by a decision of any succeeding Government.

Per Hederman J: "Government" and "cabinet" are not synonymous; it is the Government only that is expressly established as the executive organ of the State by the Constitution.

Per McCarthy J. dissenting: There is no absolute confidentiality attached to discussions at Government meetings; such a rule is inconsistent with the jurisprudence of the Court on disclosure of documents; the correct test was applied by the trial judge in himself balancing the requirements of a parliamentary inquiry with the requirements of confidential communications at government level.

Per Egan J. dissenting: The Tribunal, although not engaged in the administration of justice (not being a court), was entitled to know what decisions were made by the Government relevant to the matters it was investigating and, if a dispute arose regarding whether or not any particular decision was made, the Tribunal was entitled to hear such evidence including, if necessary, evidence of the deliberations of the Government, for the purpose of finding out what decision was arrived at, but only for such purpose."

17. Mr. Cush went on to outline what he contends to be the rationale for cabinet confidentiality as set on in the judgment at p. 266:-

"With regard to the other issues arising in the case, I have come to the following conclusions. Article 28, s. 4, sub-ss. 1 and 2 of the Constitution impose upon the members of the Government separate though clearly related obligations, and these are:

(1) They must meet as a collective authority.

(2) They must act as a collective authority.

(3) They must be collectively responsible for all the Departments of State and not merely the one which each of them administers.

(4) They have as a Government a responsibility to Dáil Éireann.

These obligations involve some obvious, necessary, consequential duties. The first of those relevant to the issues arising in this appeal is the necessity for full, free and frank discussion between members of the Government prior to the making of decisions, something which would appear to be an inevitable adjunct to the obligation to meet collectively and to act collectively. The obligation to act collectively must, of necessity, involve the making of a single decision on any issue, whether it is arrived at unanimously or by a majority. The obligation to accept collective responsibility for decisions and, presumably, for acts of government as well, involves, as a necessity, the non-disclosure of different or dissenting views held by members of the Government prior to the making of decisions."

18. It is contended on the plaintiffs' behalf that this rationale could never extend two months backwards to a document prepared by a civil servant. This is a document that long predates the government decision and does not touch on the discussion of government. The plaintiffs reassert that the onus is on the State to make out the claim.

19. In relation to whether this Court should have sight of the document it was submitted by Mr. Cush that "If you dealing with a claim that says there's a public interest in the administration of the executive which outweighs the public interest in the administration of justice, the authorities indicate the judge looks at the documents."

20. It is contended that the constitutional amendment clarified that the privilege was to extend only to meetings of the government and also introduced a power of the court which was not envisaged in the decision in *Attorney General v. Hamilton*. It is contended on this basis there cannot be any claim of absolute confidentiality.

21. It is further questioned whether any view of a minister that is expressed and relates to a decision that might be made months hence could be privileged. It is contended that this would be a massive extension of the public interest privilege.

22. It is the plaintiffs case that the situation arising does not fall within the amendment to the constitution or within the parameters of the judgment in *Attorney General v. Hamilton*.

23. Mr. Cush relies on the decisions in *Murphy v. Corporation of Dublin*, *Ambioix v. Minister for the Environment* and *Attorney General v. Hamilton* for his contention that either pursuant to the constitutional provision as set out in Article 28 of the Constitution or having regard to the authorities as cited, an early document prepared some months before the actual decision as taken by Government could not be considered as a matter discussed at Cabinet and accordingly does not attract privilege, either pursuant to the Constitution or the authorities, and consequently the two documents ought to be discovered.

24. Mr. Healy on the defendants behalf submits that a class or category of documents consisting of documents emanating from a level not below assistant secretary in the public service and being the documents of the ultimate consideration of the Ministers of the Government or the Government itself relating to the formation of the policy or proposal for legislation were absolutely exempt from production.

25. The documents in question are documents compiled in relation to the abolition of the 'living out allowance'. Mr. Healy outlined to the court that the first half of the document is a proposal by the Minister for Public Expenditure with respect to a series of allowances which are tabled for a decision of government on certain allowances which should be abolished and those which should be retained. The second part of the document sets out a series of responses by many different ministers of government which are akin to the attitudes or stances adopted by individual members of government on specific allowances that affect their department. It is a document which is designed to bring together the views of government.

26. It is advanced on the defendants' behalf that the State defendants have no difficulty with the court inspecting the documents.

27. The defendants advance absolute privilege under Article 28 Bunreacht na hÉireann and alternatively the public interest privilege.

28. It is accepted by the defendants that the documents do not record discussions at a particular meeting. The documents set out the views of respective members of government before the collective decision at Cabinet was arrived at.

29. It is contended on the defendants' behalf that there is a distinction between the present document and the kind of document at issue in *Ambiorix v. Minister for the Environment* which in the defendants' submission was a mere memorandum for government prepared by a civil servant. This would be in contrast to the bringing together of the views of government as in the present case.

30. It is the defendants' case that it is not correct to say that the privilege can be limited to discussions at Cabinet meetings. Counsel acknowledges that there is an element of uncertainty as to whether the Supreme Court in *Attorney General v. Hamilton* intended the privilege to extend beyond meetings of Cabinet. It is contended on the defendants behalf that there is a lot of dicta in *Attorney General v. Hamilton* that supports the view that the ultimate objective of privilege to preserve the confidentiality of discussion specifically as between members of the government.

31. It is contended on the defendants' behalf that there is not alone a duty to decide collectively but also a duty to act collectively and to take collective responsibility for whatever decision made. This would protect the views of those who dissent. It is contended by the defendants that the court is also entitled to have regard to the changed nature of the way in which government decisions are reached for example as in this case the accumulation of opinions in a word document.

32. It is contended on the defendants behalf that the present documents fall squarely within the wording of paragraph 2 of the headnote on p. 251 of *Attorney General v. Hamilton* which states:-

"That the express provisions of Article 28 requiring the Government to meet and act as a collective authority and the collective responsibility for acts and decisions of the Government and of Departments of State thereby imposed required as an inevitable adjunct the need for and frank discussion between members of the Government prior to the making of decisions and the complete confidentiality of those discussions."

33. It is contended on the defendants behalf that the correct approach for the non-disclosure of dissenting views is as per Finlay C.J in *Attorney General v. Hamilton*:-

"These obligations involve some obvious, necessary, consequential duties. The first of those relevant to the issues arising in this appeal is the necessity for full, free and frank discussion between members of the Government prior to the making of decisions, something which would appear to be an inevitable adjunct to the obligation to meet collectively and to act collectively. The obligation to act collectively must, of necessity, involve the making of a single decision on any issue, whether it is arrived at unanimously or by a majority. The obligation to accept collective responsibility for decisions and, presumably, for acts of government as well, involves, as a necessity, the non-disclosure of different or dissenting views held by members of the Government prior to the making of decisions."

34. Mr. Healy points out that Finlay C.J. only made one express qualification to the rule of Cabinet confidentiality:-

"[The claim for confidentiality] extends to discussions and to their contents, but it does not, of course, extend to the decisions made and the documentary evidence of them, whether they are classified as formal or informal decisions."

Further Mr. Healy notes that Finlay C.J. went on to find that whenever a privilege arises under the Constitution there is no discretion and privilege is not capable of being waived.

35. In submitting a variety of dicta from *Attorney General v. Hamilton* Mr. Healy advanced the findings of Hederman J.:-

"The Government is collectively responsible to the Dáil for all the decisions it takes or fails to take but it is not responsible to the Dáil as to the manner by which such decisions were arrived at.

If it were permissible to compel in any circumstances the disclosure of the content of discussions which take place at Government meetings the executive role of the Government as envisaged by the Constitution would be undermined, perhaps even de-stabilised. Such a situation would be wholly inconsistent with the relationship between the different organs of government established by the Constitution."

36. It is Mr. Healy's contention that the reference to discussions which take place at meetings flows from the singular issue before

the court on that occasion.

37. Mr. Healy highlighted the findings throughout the judgment that emphasised the importance of the collective responsibility of those in government in particular as noted by O'Flaherty J. wherein he states:-

"The ruling we are asked to give - and it should be emphasised that it is the first time we have been asked for such a ruling - involves that we should not condone any breach of confidentiality the observance of which is a necessary concomitant to the collective responsibility enshrined in our system of cabinet government. In my judgment we should so rule. It is of Government decisions the Dáil and, therefore, the Tribunal are to be apprised. Government Ministers, on occasion no doubt, will come to the cabinet table as promoters or defenders of their departmental interests. But they must leave not as single emissaries to recount their endeavours to another power but rather to declare what they *as the power* have decided."

38. Similarly, Egan J. held:-

"The dual reference to "collective" in regard to authority and, in particular, to responsibility is to be noted. It suggests very strongly a body which must be regarded as an entity or unit and, if I am correct in this, it must surely mean that what can be looked at is the result of the deliberations, i.e. a decision, and not the deliberations which led to it."

39. Alternatively, Mr. Healy submits that should the documents not fall within absolute privilege they should, for all of the same reasons fall within public interest privilege. In effect, that views of dissenting ministers should not come into the public domain.

40. It is contended by the defendants that the object is to preserve the confidentiality of pre-decision discussion, to promote the free exchange of views for government decisions and to avoid a defensive attitude to the free and candid exchange of ideas.

41. Mr. Healy on the defendants' behalf argues the converse position would be that any documents as prepared and involving the views of Ministers of Government on matters such as in this case where fiscal proposals are discussed leading to an eventual discussion before Cabinet could be allowed into the public domain, by way of disclosure.

42. It appears to follow that the content of a document actually prepared for discussion at Cabinet level and the views of any Ministers or high ranking civil servant as expressed in the document for the purpose of assisting the Cabinet are subject to Article 28.4.4 of the Constitution and that disclosure can only be made in respect of a particular matter in the interests of the administration of justice by a court or by virtue of an overriding public interest in respect of a tribunal appointed by the Government or the Minister of the Government on the authority of the Houses of the Oireachtas.

43. To an extent this application [which comes before this Court at the last moment before a scheduled full hearing in a five days' time] is blurred between the constitutional aspect of strict Cabinet confidentiality and the general public interest aspect.

44. I have had the benefit of viewing and considering both documents at the suggestion of counsel for both parties herein and such a convenience has assisted me in having an understanding as to the content of the document which basically as outlined by Mr. Healy on the defendants behalf in this Court consists of certain fiscal proposals in respect of public services allowances and premium pay and proposals being made by the Minister for Public Expenditure and Reform and various other Ministers of specific Government departments being asked for and providing their comments. The earlier document is followed by Document No. 2 which relates specifically to the review insofar as it concerns certain medical aspects and contains a single page document described as the Draft Ministerial Observations as attached and these come from the Minister for Health.

45. The two documents accordingly appear to be preliminary documents with proposals by one Minister and relevant comments as put forward by the relevant Ministers of the other departments in respect of those proposals which affect the particular department.

46. In many respects the views of Finlay C.J. as set out on p. 266 of the judgment in *Attorney General v. Hamilton* appear to be relevant accepting that members of the Government must meet as a collective authority, act as a collective authority, be collectively responsible for all the Departments of State and not merely the one which each of them administers and they have as a Government responsibility to Dáil Éireann.

47. Finlay C.J. goes on to state the situation arising in the following terms:-

"These obligations involve some obvious, necessary, consequential duties. The first of those relevant to the issues arising in this appeal is the necessity for full, free and frank discussion between members of the Government prior to the making of decisions, something which would appear to be an inevitable adjunct to the obligation to meet collectively and to act collectively. The obligation to act collectively must, of necessity, involve the making of a single decision on any issue, whether it is arrived at unanimously or by a majority. The obligation to accept collective responsibility for decisions and, presumably, for acts of Government as well, involves, as a necessity, the non-disclosure of different or dissenting views held by members of the Government prior to the making of decisions."

48. The two documents involved in this application involve direct communication between senior Ministers of Government in respect of matters fiscal and involve the comments and views of the relevant department Ministers and in the view of this Court it is in the public interest as a necessity that the disclosure of different or dissenting views held by members of the Government prior to the making of a decision at cabinet be protected in the public interest.

49. In these circumstances this Court does not have to make a judicial determination as regards the specific aspect of Cabinet confidentiality and the provisions of Article 28.4.4 of the Constitution, to the particular facts and circumstances arising.

50. Accordingly, production of the two relevant documents is denied.