Neutral Citation Number: [2007] IEHC 348

THE HIGH COURT

(DIVISIONAL COURT)

JOHNSON P.
KELLY J.
O'NEILL J.

[2007 No. 125SP]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 4 OF THE TRIBUNALS OF INQUIRY (EVIDENCE) (AMENDMENT) ACT, 1997 AS AMENDED BY SECTION 3 OF THE TRIBUNALS OF INQUIRY (EVIDENCE) (AMENDMENT) ACT, 2004

BETWEEN

HIS HONOUR JUDGE ALAN P. MAHON
HER HONOUR JUDGE MARY FAHERTY AND
HIS HONOUR JUDGE GERALD B. KEYS,
MEMBERS OF THE TRIBUNAL OF INQUIRY INTO
CERTAIN PLANNING MATTERS AND PAYMENTS

PLAINTIFFS

AND

COLM KEENA AND GERALDINE KENNEDY

DEFENDANTS

Judgment of the Court delivered on the 23rd day of October, 2007.

1. The plaintiffs are the Members of the Tribunal of Inquiry into Certain Planning Matters and Payments (hereinafter referred to as "the Tribunal") established pursuant to Resolution of Dáil Éireann passed on 7th October, 1997 and by Instruments of the Minister for the Environment and Local Government of 4th November, 1997, 15th of July, 1998, 24th October, 2002, 7th July, 2003 and 3rd December, 2004.

2. The first defendant is a journalist employed by the Irish Times and the second defendant is the editor of that paper.

3. On 29th June, 2006, as part of its private investigations the Tribunal wrote to Mr. David McKenna seeking information in relation to certain payments made to An Taoiseach, Mr. Ahern, T.D. The envelope which contained this letter was marked "*strictly private and confidential – to be opened by addressee only*".

4. The final paragraph of the letter read as follows:

> "This inquiry is being made of you as part of the Tribunal's confidential inquiry in private. The fact of this letter or its content should not be disclosed to any third party save your legal adviser, if you should choose to seek legal advice in respect of this request."

5. On 19th September, 2006 the first defendant received, unsolicited and anonymously, a communication concerning payments to An Taoiseach in 1993 when he was Minister for Finance. This communication took the form of a copy of the letter of 29th June, 2006 from the Tribunal to Mr. McKenna and at least one other document, being a copy of the reply to this letter from a solicitor for Mr. McKenna.

6. Thereafter the first defendant during 19th and 20th September, 2006 sought to verify the accuracy of the information received. During this time the first defendant discussed the matter with the second defendant on a number of occasions. As a result of all this the first defendant wrote and the Irish Times published on 21st September, 2006, a report under the headline "Tribunal examines payments to Taoiseach", on the front page. This report read as follows:

> "A wealthy businessman, David McKenna, has been contacted by the Mahon Tribunal about payments to the Taoiseach, Bertie Ahern.
>
> The Tribunal is investigating a number of payments to Mr. Ahern in or around December, 1993 including cash payments, the Irish Times has learned.
>
> Mr. McKenna is one of three or four persons contacted by the Tribunal concerning payments to Mr. Ahern totalling between €50,000 and €100,000. The Tribunal has been told that the money was used to pay legal bills incurred by Mr. Ahern around this time. In a letter to Mr. McKenna in June of this year and seen by the Irish Times he was told the 'tribunal has been informed that you made payment of money to Mr Bertie Ahern, TD, or for his benefit, in or about December 1993.
>
> 'The tribunal seeks your assistance in reconciling certain receipts of funds by Mr Ahern during this period.'
>
> The tribunal requested a detailed statement from Mr McKenna. He was asked to name the person who requested the payment and his understanding as to why it was required. He was also asked who the payment was given to and whether it was in cash or another form.
>
> It is understood a solicitor who was an associate and personal friend of Mr Ahern's, the late Gerry Brennan, may have played a role in the matters being inquired into. Mr Brennan, a former director of Telecom Éireann, died in 1997.
>
> Mr McKenna, a friend of Mr Ahern's and a known supporter of both him and his party, was estimated to be worth more than €60 million a number of years ago. However, his publicly-listed recruitment firm, Marlborough Recruitment, collapsed in 2002.
>
> Mr McKenna is also a friend and business associate of Des Richardson, the businessman appointed by Mr Ahern in 1993 as full-time fundraiser for Fianna Fáil and who also fundraises for Mr Ahern's constituency operation. The tribunal was told in private that Mr McKenna was one of the people who made a payment to Mr Ahern.
>
> Special adviser to the Taoiseach Gerry Howlin was not available for comment as he was on leave.

> When contacted by The Irish Times the Government press secretary, Mandy Johnston, passed the query on to the Fianna Fáil press officer Olivia Buckley, who said Mr Ahern did not comment on tribunal matters.
>
> Mr McKenna, when asked about the matter, said: 'Contact my solicitor.' His solicitor said he had no comment.
>
> The Mahon tribunal and Mr Ahern are scheduled to make representations about the matter before the President of the High Court, Mr Justice Joseph Finnegan, next month.
>
> In December 1993, Mr Ahern was Minister for Finance and Fianna Fáil treasurer.
>
> The inquiries into Mr Ahern's finances are understood to have begun after allegations were made about supposed payments to him by property developer Owen O'Callaghan in relation to the Quarryvale development in west Dublin.
>
> Both Mr Ahern and Mr O'Callaghan have stated publicly that no such payments were made.
>
> …"

7. As is apparent, this report quoted from the contents of the letter of 29th June, 2006 from the Tribunal to Mr. McKenna.

8. A disclosure of the contents of this letter was unauthorised by the Tribunal.

9. On the evening of 21st September, 2006, the Tribunal wrote to the second defendant expressing concern that the report appeared to be based on a letter from the Tribunal that was strictly private and confidential and it was claimed that the publication of this material was in breach of an injunction granted by the Supreme Court on 7th October, 2005.

10. By a letter of 29th September, 2006 the second defendant replied, *inter alia*, as follows:

> "… the circumstances of this matter are straightforward. The Irish Times received an unsolicited and anonymous communication that I considered an important matter in the public interest for this newspaper to verify and publish. The vital issue of public interest which I considered I had a duty to publish was that the Taoiseach, Mr. Ahern, whilst a serving minister was in receipt of certain payments of money. The fact of these payments is a matter that this newspaper has a proper interest in publishing.
>
> This is not a situation where an allegation of a payment has been made that is denied or is false. The fact of these payments is admitted. …
>
> I have explained above how the matter came to be published. The Irish Times does respect the important public function of the Tribunal. This does not, however, mean that this newspaper will desist from discharging its separate duty to publish matters in the public interest. I think you might agree that no single person or entity in this State (including this newspaper) has a monopoly on supporting constitutional democracy. …"

11. On 25th September, 2006 the Tribunal ordered both defendants to produce to the Tribunal at its offices all documents which comprised the communication received by the Irish Times which led to the publication of the article in that paper on 21st September, 2006.

12. By a letter of the same date the second defendant informed the Tribunal that the Irish Times was not in a position to comply with this order as the material sought had been destroyed and furthermore the newspaper disputed the right of the Tribunal to make an order requiring the production of these documents on the grounds that the production of this material would run the risk of identifying journalistic sources, thereby putting in jeopardy the primary obligation of every editor and journalist to protect their sources of information, and that it was in the public interest that this obligation and right was protected, in the production of a story, which in itself was published in the public interest.

13. The material the subject matter of the anonymous communication to the defendants was destroyed after the defendants were made aware of the Tribunal's order of 25th September, 2006 and after the defendants had taken legal advice.

14. On 26th September, 2006 the Tribunal issued two witness summonses under the provisions of the Tribunals of Inquiry (Evidence) Acts, 1921 – 2004 commanding both defendants to attend before the Tribunal at a public sitting on Friday, 29th September, 2006 at 10.30 and then and there to produce and hand over to the Tribunal copies of all documents which comprised the communication between the Tribunal and Mr. David McKenna received by the Irish Times which led to the publication of the article in question, to answer all questions to which the Tribunal would require answers in relation to the source and present whereabouts of the documents referred to; to answer all further or other questions to which the Tribunal would require answers relating to or arising from the articles written by the first defendant and published in the Irish Times on 21st September, 2006 and the recent correspondence to and from the Tribunal relating thereto, and to answer any further or other questions to which the Tribunal would require answers.

15. On 29th September, 2006 both defendants furnished written statements of their evidence to the Tribunal. On the same day both defendants appeared before the Tribunal. Because the documents sought by the Tribunal had been destroyed the defendants could not produce these as required by the summons. Both defendants declined to answer any questions which in their view would give any assistance in identifying the source of the anonymous communication. In her evidence the second defendant did acknowledge that the communication was unsolicited and anonymous.

16. On 5th October, 2006 the Chairman of the Tribunal delivered the ruling of the Tribunal in which having recited the foregoing facts he said, *inter alia*:

> "On 29th September, 2006 both witnesses attended the Tribunal in answer to summonses and were apprised by me of the provisions of the Tribunals of Inquiry (Evidence) Acts and of the obligations imposed upon them by such Acts. They were also apprised of the potential consequences for them in the event that they failed to comply with the obligations imposed on them.
>
> Upon being questioned by counsel on behalf of the Tribunal and in direct response to me both witnesses refused to answer any questions which they believed might be of assistance to the Tribunal in determining the source of the unauthorised disclosure of Tribunal material. In their evidence they confirmed that they had destroyed their copies of the

documentation after they had been made aware of the existence of the orders which required their production to the Tribunal. …

It is not in dispute that both Ms. Kennedy and Mr. Keena have refused to answer questions put to them by the Tribunal and that they have failed to produce the documents which they were ordered to produce. By their own admission they have destroyed documents which were the subject of a Tribunal order of which they were aware.

The Tribunal considered that such acts and omissions amount to breaches of the Tribunal's orders and the Tribunals of Inquiry (Evidence) Acts, 1921 to 2004. This Tribunal is not a court of law, it has no power to adjudicate upon acts which may amount to criminal wrongdoing nor has it the power to impose civil sanction upon a party who is in breach of its orders. The powers of the Tribunal are limited to conducting its inquiry, reporting upon its findings and making its recommendation to the Oireachtas.

However, the Tribunal does have the power to seek the assistance of the High Court where a person has failed or refused to comply with an order of the Tribunal or where that person has disobeyed an order of the Tribunal. The Tribunal has decided that it will exercise these powers conferred upon it by section 4 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1997 to seek orders from the High Court to compel Ms. Kennedy and Mr. Keena to comply with the Tribunal's orders which they have breached to date.

The primary concern of the Tribunal at present is to protect the integrity of its inquiries and it is of the view that this objective is best served by taking all necessary steps to establish the identity of the party or parties who furnished the documentation to the Irish Times which led to the publication of the article of 21st September, 2006.

In the event that the High Court grants such orders, the Tribunal intends to reconvene the sessions of the Tribunal to endeavour to elicit the information sought from Mr. Keena and Ms. Kennedy, failure to comply fully with an order of the High Court can amount to a contempt of court. …

The publication of the Irish Times article has given rise to considerable speculation as to the source of the unauthorised disclosures which have led to this publication. The Tribunal is concerned to note that in the press coverage of this matter it has frequently been referred to as 'a leak from the Tribunal', thereby carrying the inference that the Tribunal itself was instrumental in breaching the confidence of those parties with whom it had dealings. Any such conduct would be a gross dereliction of duty on the part of the Tribunal or any of its personnel.

The Tribunal was appointed under the following resolution of both Houses of the Oireachtas in order to inquire into and report upon the current allegations of corruption. A serving High Court Judge, Mr. Justice Feargus Flood was appointed as sole Member of the Tribunal thereby signalling to the public that the matter would be inquired into in a totally independent, fair and impartial way. The current Tribunal Members are all serving members of the judiciary, the standards of probity which we have applied to our task as members of this tribunal are no less than those which we apply in our judicial office.

The Tribunal rejects the inference made that the Tribunal has leaked material to the media or elsewhere. The Tribunal is mindful of the fact that public confidence in the integrity of the Tribunal is essential if the Tribunal is to serve the purpose for which it was established. Any suggestion that the Tribunal was acting to single out or damage the interests of any particular individual or group is without foundation. Any person who maintains the contrary, in the absence of any evidence whatsoever to support their belief, does considerable harm to the good standing of the Tribunal, which has been set up to allay public disquiet arising from allegations of corruption in the planning process. …"

17. Pursuant to the ruling of the Tribunal these proceedings were commenced by special summons issued on the 13th day of February, 2007 in which the reliefs now claimed in these proceedings were sought. As a result of the destruction of the documents as aforesaid, the reliefs now claimed are limited to the following:

"(a) Pursuant to section 4 of the Tribunal of Inquiries (Evidence) (Amendment) Act, 1997 (as amended):-

(i) An order compelling the first and second named defendants herein to comply with the order of the Tribunal dated 25th September, 2006.

(ii) If necessary, an order specifying a new date by which the first and second named defendants must comply with the order of the Tribunal dated 25th September, 2006.

…

(iv) An order compelling the first and second named defendants to attend before the Tribunal on such date and at such time as this honourable court may direct and then to answer all questions to which the Tribunal may require answers in relation to the source and present whereabouts of the documents mentioned in the witness summons dated 26th September, 2006.

…

(vi) An order compelling the first and second named defendants to attend before the Tribunal on such date and at such time as this honourable court may direct and then to answer all further questions to which the Tribunal may require answers.

(vii) Such further relief as shall seem appropriate to this honourable court so as to enable the order of the Tribunal dated 25th September, 2006 and the two witness summonses dated 26th September, 2006 to have full effect."

Issues

18. The evidence on affidavit, the written submissions, and the oral submissions by Mr. McDonald S.C. for the Tribunal and Mr. McGonigal S.C. for the defendants require this Court to consider and determine the following issues:

1. Does the Tribunal have the necessary legal power to conduct an inquiry to ascertain the source of the unsolicited and anonymous communication to the Irish Times and did the Tribunal have power to summons the defendants to appear

before it to produce and hand over the documents which were the basis of the communication to the Irish Times and to answer the questions of the Tribunal in respect of which the Tribunal seeks the relief in these proceedings?

2. Is the Tribunal entitled to conduct investigations in private and does the Tribunal have a right to impose an obligation of confidentiality in respect of communications from it to persons with whom it wishes to make inquiries as part of its private investigation and in respect of communications received and documents furnished from persons to the Tribunal, and is the Tribunal entitled to enforce such an obligation of confidentiality against third parties who come into possession of materials in respect of which aforesaid the Tribunal asserts an obligation of confidentiality?

3. If the Tribunal has the necessary legal powers to conduct the aforesaid inquiry and to summons the defendants as aforesaid and if the Tribunal is entitled to enforce an obligation of confidentiality against third parties, including the defendants in this case in respect of communications of the sort at issue in these proceedings, how is that right of the Tribunal to be balanced against the defendants' right to freedom of expression as guaranteed in Article 40.6.1.i of the Constitution, and article 10 of the European Convention on Human Rights and in particular the public interest in the preservation from disclosure of journalistic sources, as an essential prerequisite of a free press in a democratic society?

The Ultra Vires Issue

19. The defendants submitted that the Tribunal lacked a legal power to conduct an inquiry to ascertain the source of the leak of the documents that were furnished to the Irish Times. They submitted that neither the terms of reference of the Tribunal nor the statutory powers conferred upon the Tribunal in the Tribunals of Inquiry (Evidence) Acts, 1921 to 2004, conferred such a power on the Tribunal.

20. It was further submitted that even if the Tribunal had such a power a prerequisite to the exercise of it, would have been to have summoned Mr. McKenna and his solicitor before the Tribunal to answer its inquiries in regard to the leak, before requiring the defendants to disclose the source of the leak or assist in ascertaining the source of the leak in circumstances where the defendants under article 10(1) of the European Convention on Human Rights enjoyed a right to refuse such disclosure or assistance.

21. For the Tribunal it was submitted that article J(5) of the Resolution of Dáil Éireann passed on 17th November, 2004, which is in the following terms expressly gave the Tribunal the power to conduct an enquiry to ascertain the source of the leak:

> "Nothing in these amended terms of reference shall preclude the Tribunal from conducting hearings or investigations into any compliance or non-compliance by any person with the orders or directions of the Tribunal."

22. It was submitted that the letter to Mr. McKenna which came into the possession of the defendants contained a specific direction that the existence of the letter and its content should be kept confidential. It was submitted that the defendants who came into possession of this communication were bound pursuant to the judgment of Keane J. in the case of *Oblique Financial Services Limited v. The Promise Production Company* [1994] to comply with the direction as to confidentiality. Hence the Tribunal was, under the express provision of Clause J(5) of the aforesaid terms of reference, empowered to investigate a breach of that direction.

23. It is further submitted that apart from this express provision in the terms of reference, s. 4 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979 amply supplied the legal power to the Tribunal to conduct its inquiry into the source of the leak. This section reads as follows:

> "4. – A tribunal may make such orders as it considers necessary for the purpose of its functions, and it shall have, in relation to their making, all such powers, rights and privileges as are vested in the High Court or a judge of that court in respect of the making of orders."

24. Reliance was placed in this regard upon the case of *Kiberd v. Hamilton* [1992] 2 I.R. 257, in which Blayney J. held that an order by the then Chairman and Sole Member of the Beef Tribunal directing the applicant in that case to appear before that tribunal and to produce material upon which articles were based and answer questions as to the source of the material, was a valid exercise of the power contained in s. 4 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979. It was further submitted that the tribunal as a body exercising statutory powers was entitled to exercise not only those express powers but also such other powers as were reasonably incidental or consequential to those express powers. In this regard it was submitted that the power to conduct an inquiry into the source of these leaks was necessary and consequential to the statutory powers given to carry out investigations in private into certain matters of public interest. It was further submitted that the defendants, when they appeared before the Tribunal on foot of the aforesaid summonses, had not at that stage challenged the power of the Tribunal to conduct an inquiry into the sources of the leak or to summons them to appear before it for that purpose. Nor had they invoked the judicial review jurisdiction of the High Court to challenge the power of the Tribunal in that regard. Whilst it was conceded that the failure of the defendants to have made these challenges did not give rise to an estoppel which prevented them at this stage raising a challenge to the legal powers of the Tribunal to conduct such an inquiry, the failure to have so done when opportunity presented itself in the past, was a factor which this Court should consider in assessing the merits of the challenge now made in these proceedings.

25. It is apparent that the letter which was sent to Mr. McKenna and which ended up in the possession of the defendants was emblazoned with the most explicit direction to observe confidentiality both as to the existence of the letter and its content. We are satisfied that this direction not only bound the recipient of the letter, Mr. McKenna, but also third parties who came into possession of it, to observe the obligation of confidentiality which attached to this communication, a topic which is dealt with later in this judgment.

26. Accordingly, the manifest breach of the direction in respect of confidentiality was one which we are satisfied came within the express terms of Clause J (5) of the Terms of Reference of the Tribunal. On that basis alone the Tribunal had ample power to conduct an inquiry into the source of the leak and to summons both defendants to appear before it and to produce the documents which were the subject matter of the communication to them.

27. In addition, we are also satisfied that s. 4 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979 also provides an ample legal basis for the power that was exercised.

28. In the case of *Kiberd v. Hamilton* [1992] 2 I.R. 257 Blayney J. was confronted with the same *ultra vires* issue, in regard to s. 4 of the 1979 Act as we must now consider. In that case, the Sole Member of the Beef Tribunal, Mr. Justice Hamilton, had made an order against the applicant in the case, Mr. Kiberd, in similar terms to that addressed to the defendants in this case. Mr. Kiberd had then

brought judicial review proceedings to challenge the power of the Beef Tribunal to make that order. Section 4 of the 1979 Act was relied upon as the legal basis for the power exercised. Blayney J. concluded that for a valid exercise of the power contained in s. 4. What was required was that the Tribunal, form the opinion that the order made was necessary for the purposes of the functions of the Tribunal, was made bona fide and that the opinion of the Tribunal was supported by facts and was not unreasonable. In the course of his judgment he went on to say:

> "As to whether the Tribunal's opinion is supported by the facts and is not unreasonable the position would appear to be this. The two articles which appeared in the Sunday Business Post were based upon material which had been given to the Tribunal in confidence. It was to be made available solely to parties to the inquiry. Mr. Justice Hamilton believes that if the authorship of the articles is not inquired into there is a real danger that witnesses who might otherwise have come forward will not do so and that documents which might be made available to the Tribunal will be withheld. That belief is stated at paragraph 7 of his affidavit which I referred to earlier and it was also stated by Mr. Justice Hamilton in the course of the hearing before him on 14th February, 1992 where he said:-
>
> > '… the Tribunal is to carry out extensive inquiries into extensive allegations. It has to seek the assistance of people who can be of assistance to the Tribunal and there is a real danger that it won't get that assistance if the material, there is any fear that the material that they would make available to the Tribunal would be disclosed to the public press before it is presented before the Tribunal and that would have an inhibiting effect on people who otherwise might be willing to assist this Tribunal. To that extent and in that context there is a possible prejudice of the proceedings before the Tribunal.'
>
> It seems to me that there were grounds to support this view and that it was not unreasonable to entertain it. It is perfectly understandable that some people would be reluctant to make material available to the Tribunal if they thought there was a risk that it could appear in the public press before being put in evidence at the hearing of the Tribunal. And if witnesses were dissuaded from coming forward with material relevant to the inquiry, then clearly the Tribunal would be hampered in carrying out its functions in that it would be deprived of the opportunity of hearing witnesses and considering material which was of assistance to it. Apart from this, it seems to me that the Tribunal had to take steps to ensure that no further articles would be published based upon material submitted in confidence to the Tribunal. If it did nothing about the articles which had appeared in the Sunday Business Post there would be a risk of a recurrence and the step which it took by making the relevant order was for these reasons necessary in the circumstances."

29. In our opinion the reasoning of Blayney J. applies with, if anything, greater force to the circumstances of this case where, in addition to the factors mentioned by Blayney J. in the foregoing passage from his judgment, additionally in this case the Tribunal has to contend with widespread media attribution of the leaks to the Tribunal itself with the additional damage this does to the Tribunal.

30. We are satisfied, therefore, that the Tribunal did have the necessary legal power to conduct an inquiry into the sources of this leak and to have summonsed the defendants to appear before it and produce documents.

31. We do not accept that it was necessary for the Tribunal before exercising its legal powers in this regard to have first examined Mr. McKenna on oath. The plain language of Clause J(5) of the Terms of Reference (part of a Resolution of Dáil Éireann) and of s. 4 of the Act of 1979 does not support any such construction. Indeed, to interpret the power conferred in either of these two instruments as requiring such a prerequisite would be to add in additional language to that used by the Oireachtas in circumstances where there is no ambiguity or lack of clarity as to the meaning of the language used in either instrument, and would be contrary to the ordinary canons of interpretation.

The Confidentiality Issue

32. For the Tribunal it was submitted that the Tribunal has a right to conduct its inquiry by way of a private investigative phase. In this regard reliance is placed upon the cases of *Haughey v. Moriarty* [1999] 3 I.R. 1, *O'Callaghan v. Mahon* [2006] 2 I.R. 32, and *O'Callaghan v. Mahon (No. 2)* (Unreported, Supreme Court, 30th March, 2007).

33. The defendants do not dispute the right of the Tribunal to conduct its inquiry initially through a private investigative phase.

34. The Tribunal submits that a necessary corollary of its right to conduct its inquiry in private is the right to impose and enforce an obligation of confidentiality on those persons with whom it deals in that phase of the inquiry and also on third parties who come into possession of material given to the Tribunal to which an obligation of confidentiality attaches. Insofar as third parties are concerned, the Tribunal places reliance upon the judgment of Keane J. in the case of *Oblique Finance Services Limited v. The Promise Production Company* [1994] I.L.R.M. 74.

35. The Tribunal further submits that the letter to Mr. McKenna which came into the possession of the defendants was a communication in respect of which an obligation of confidentiality attached to the recipient of it and also to third parties such as the defendants. The Tribunal submits that this communication satisfies the test to be met to establish an obligation of confidentiality as discussed in the judgment of Kelly J. in the case of *Mahon v. Post Publications Limited* (Unreported, High Court, 4th October, 2005). The Tribunal submits that this case is to be distinguished from the case of *Mahon v. Post Publications Limited*, (Unreported, Supreme Court, 29th March, 2007) where the Supreme Court upheld the judgment and order of Kelly J. in the High Court refusing injunctive relief to the Tribunal to enforce confidentiality of documents circulated in briefs to persons affected by a matter to be inquired into in public by the Tribunal. It submits that communications such as the ones at issue in this case which occur during the private investigative phase before a decision is taken by the Tribunal to proceed to a public inquiry are wholly different and that distinction itself was expressly referred to by Fennelly J. at paragraph 69 of his judgment where he says:

> "…Clearly a matter which I wish to make perfectly clear, none of this concerns the confidentiality of the entirely private proceedings of the Tribunal in its investigative phase, conducted prior to the decision to go on to public hearings and to circulate briefs. That is the ordinary right to confidentiality that any person or body possesses in respect of his, her or its own internal activities. That type of confidentiality has already been dealt with by this Court in JR324. Nobody, whether in or out of the media, has the right to invade or trespass upon the internal workings of any individual or organisation. Problems arise only when information has been released or, as often happens, 'leaked'."

36. It was further submitted by the Tribunal that there is a public interest in upholding the confidentiality of the private investigative phase of the inquiry because unauthorised disclosures of information from this phase of the inquiry damages the reputation of the Tribunal itself because of the attribution of these leaks to the Tribunal itself, impairs the capacity of the Tribunal to discharge its function because of the injury to public confidence in it, with the consequence of diminution in the co-operation of the public with the Tribunal, resulting inevitably in persons being reluctant to volunteer information or documents which would be of assistance to the

Tribunal in its inquiry and also risks breaching the rights of persons with whom the Tribunal is making inquiries in circumstances where these persons may be either unwilling or unable to take the necessary steps to protect their rights. It was submitted that the position of the Tribunal in its private investigative phase is totally different from that of other public bodies. Insofar as the latter is concerned, the public have both an interest and a right in scrutinising, reviewing and criticising the conduct by them of their affairs, whereas the public interest so far as the private investigative phase of the work of a tribunal is concerned is precisely the opposite, namely the public interest is in the maintenance of confidentiality of the inquiries being conducted at that stage. Thus it was submitted that the line of authority emanating from the judgment of Mason J. in the High Court of Australia in the *Commonwealth of Australia v. Fairfax* [1980] 147 C.L.R. 39, cannot apply, as mere disclosure of itself damages the public interest in the maintenance of confidentiality of the Tribunal's private investigative phase, whereas mere disclosure in respect of the affairs of public bodies is, as was said, no vice because the public are entitled to be aware of what public bodies are doing and to have their affairs subject to public discussion, scrutiny and review.

37. For the defendants it was submitted that the judgment of the Supreme Court in *Mahon v. Post Publications Limited* did apply and it was submitted this was clearly contemplated to be so by Fennelly J. where he expressly refers – "Problems arise only when information has been released or as often happens 'leaked'." It was submitted that the documents which were the basis of the anonymous communication to the defendants were thus not confidential and could not be made so by the Tribunal in the same way that the Tribunal could not impose an obligation of confidentiality in respect of material circulated in briefs as was the case in the *Sunday Business Post* case. It was submitted that as this material was "leaked" there was no invasion by the defendants of the workings of the Tribunal and although accepting that in principle confidentiality applied to the private investigative phase it was submitted that once this material was leaked the Tribunal could not then restrain its further disclosure, unless that further disclosure interfered with the functions of the Tribunal, but in this regard there was no evidence of any such interference. It was submitted that in principle there was no difference between the disclosure in this case resulting from a leak which did not interfere with the functions of the Tribunal and the material leaked from the circulated briefs in the *Sunday Business Post* case. Hence it was submitted that material once released or leaked in this way and in the absence of any evidence of interference with the functioning of the Tribunal, the Tribunal could not thereafter assert any confidentiality in respect of that material and could not seek to have its further disclosure restrained. It was further submitted that the Tribunal had no standing to protect the rights of persons affected by disclosure. It was a matter for these parties to take such steps as were appropriate to assert their own rights, and furthermore, there was no evidence in the case to establish that the rights of third parties would be damaged.

38. We are satisfied that the Tribunal does enjoy a right to impose confidentiality in respect of material assembled in its private investigative phase. This right is a corollary of its right to conduct an inquiry by way of private investigation. We are of opinion that the functioning of a private investigative stage of an inquiry would be grossly impaired without confidentiality which can be enforced. The assurance of confidentiality is essential in gaining the co-operation of the public and in having information and documents volunteered to the Tribunal which are relevant to and of assistance in its inquiries.

39. Whilst it is the case as was remarked by Fennelly J. in the *Sunday Business Post* case the Tribunal may enjoy "the ordinary right to confidentiality", we are of opinion that the express provision in the Dáil resolutions for a private investigative phase, necessarily carries with it an obligation on the part of the Tribunal to impose confidentiality in these inquiries and the materials they yield and with that, the right to enforce that obligation of confidentiality against those who would breach it. It necessarily follows that the obligation to observe confidentiality affects all persons who come into possession of material which has the indicia of Tribunal confidentiality on it.

40. Material which is to attract this entitlement must as discussed in the judgment of Kelly J. in the Sunday Business Post case have about it the necessary attributes of confidentiality. In essence these are, that the nature of the material must have about it a quality of confidentiality and its release must have been unauthorised by the party who is entitled to assert an obligation of confidentiality over it.

41. In this case there is no doubt the material was "leaked". We are satisfied on the evidence that the Tribunal did not in anyway authorise the release or "leaking" of this material.

42. Thus the mere fact that it was "leaked" in our view distinguishes the disclosure of this material from material which is authorised by the Tribunal to be released and circulated such as where evidence is circulated in the form of briefs in advance of a public hearing.

43. We are satisfied that the documents as described in evidence i.e. the letter to Mr. McKenna together with the envelope in which it came were clearly marked as being confidential material, both as to the existence of the document and its content. Furthermore the content of the letter would be such as to impress any reasonable reader of it, that the communication contained in it was of a confidential nature.

44. We are satisfied therefore that these documents had about them the attributes of confidentiality and the Tribunal was entitled to impose an obligation of confidentiality in respect of them on the designated recipient of the document and all others who came into possession of it or them. Having concluded that the leaking of this material was not authorised by the Tribunal, we are satisfied the right to enforce confidentiality in respect of it was not lost by virtue of that leaking.

45. As already said maintenance of confidentiality limited though it may be is essential to the proper functioning of the Tribunal in a private investigative phase. Hence the leaking of material as occurred here is in itself in our view damaging to the proper functioning of the Tribunal.

46. Much stress was laid by Mr. McDonald S.C. for the Tribunal on the injury to the reputation of the Tribunal caused by the widespread attribution of the leak to the Tribunal itself. Insofar as there is injury to the personal reputations of a member of the Tribunal or its staff, the view of this court is that it is a matter for these individuals themselves to take such steps to protect their reputations. Insofar as there is by virtue of these leaks and the attribution of them to the Tribunal injury to the reputation of the Tribunal as a statutory body, that injury is to be measured solely by reference to any interference with the capacity of the Tribunal to discharge its function.

47. We are satisfied that a perception amongst the public that material provided under an assurance of confidentiality to the Tribunal could be leaked to the media would be very damaging to the proper functioning of the Tribunal. Inevitably this would lead to a loss of public confidence in the Tribunal and would deter members of the public from voluntary cooperation with the Tribunal which would hinder the Tribunal in pursuing the inquiries directed by the Oireachtas. Thus we are satisfied that the disclosure or leaking of this material as occurred here of itself inflicts sufficient damage on the capacity of the Tribunal to properly function as to warrant the upholding and enforcement of the confidentiality asserted by the Tribunal.

48. We are satisfied that a Tribunal in a private investigative stage of an inquiry is not in the same position as some other public body whose functioning could or should ordinarily be subject to public scrutiny and in respect of whom there could be no general restraint on disclosure. The opposite is the case here. Thus the line of authority emanating from the judgment of Mason J. in the High Court of Australia in the Fairfax case to the effect that mere disclosure of the functioning of public bodies is no vice and cannot be restrained in the absence of some other evidence of injury to the public interest, can have no application to this Tribunal when conducting its inquiry in a private investigative phase.

Balancing the Rights of the Parties

49. Having concluded that the Tribunal did have the legal power to conduct an inquiry to ascertain the source of this leak and to have summoned the defendants to appear before it to answer its inquiries and to produce the documents in question, and having further concluded that the Tribunal is entitled to impose an obligation of confidentiality in respect of the communications given anonymously and unsolicited to the defendants and to seek to have that enforced, we now move to consider how the Tribunals right to enforce confidentiality in respect of this material is to be balanced against the defendants entitlements as journalists, pursuant to Article 10 of the European Convention on Human rights not to have to disclose their sources.

50. Article 10 of the European Convention on Human Rights is as follows:-

> "Freedom of Expression
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

51. In the written submissions of both parties and the oral argument before us a great many cases decided in the European Court of Human Rights relating to the issue of freedom of expression were opened to the court.

52. In summary these were as follows:

1. *Sunday Times v. The United Kingdom* (1979) 2 EHRR 245, in which it was held that an injunction ultimately granted by the House of Lords restraining publication of an article in the Sunday Times written to assist parents of children injured by the thalidomide drug to obtain more favourable settlements of their actions was an interference with the Sunday Times freedom of expression and not justified under Article 10(2) which permits such restrictions "as are prescribed by law and necessary in a democratic society … for maintaining the authority and impartiality of the judiciary". The court decided that though prescribed by law and for the purposes of maintaining the authority of the judiciary the restriction was not justified by a "pressing social need" and could not therefore be regarded as "necessary" within the meaning of Article 10(2).

2. In *Lingens v. Austria* (1986) 87 EHRR 329 the European Court of Human Rights held that a conviction of a journalist for criminal defamation for having written two articles alleging that the Austrian chancellor had protected former members of the Nazi SS for political reasons and for facilitating their participation in Austrian politics was a violation of Article 10.

3. In *Castells v. Spain* (1992) 14 EHRR 445, it was held that the conviction of the applicant for publishing in a weekly magazine an article which insulted the government with the penalty of disqualification from public office, violated the applicants freedom of expression within the meaning of Article 10.

4. In *Goodwin v. The United Kingdom* (1996) 22 EHRR 123, the applicant journalist had received an anonymous communication containing sensitive information regarding the financial status of a company known as Tetra. Information he was given appeared to come from a corporate plan document that was "strictly confidential". Tetra obtained a High Court interim injunction restraining the publication of the information and additionally the High Court ordered the applicant to disclose his source. On appeal both to the Court of Appeal and the House of Lords, the disclosure was upheld and in addition the applicant was fined £5,000 for contempt of court in refusing to comply with the order to disclose his source. The European Court of Human Rights held that there had been a violation of the applicants right to freedom of expression as contained in Article 10.

5. In *Dehaes and Gijsels v. Belgium* (1997) 25 EHRR 1 the court held that, apart from one minor aspect of the case, a judgment given by the Belgian courts for defamation against the applicants, in respect of articles they had published accusing four Belgian judges of bias in the handling of a case, was a violation of the applicants freedom of expression as guaranteed by Article 10.

6. In *Fressoz and Roire v. France (*1999) 31 EHRR 28 the court held that the applicants convictions for handling photocopies of tax returns obtained through a breach of professional confidence by an unidentified tax official infringed their right to freedom of expression.

7. In *Tromsov v. Norway* (1999) 29 EHRR 12 the court held that the judgment for defamation against the applicants in respect of an article published by them alleging breaches of seal hunting regulations was an unjustified interference with the applicants right to freedom of expression.

8. In *Radio Twist AS v. Slovakia* (Unreported, European Court of Human Rights, 19th December, 2006) the court held that the respondent violated Article 10 of the Convention by permitting a civil action against the applicant in respect of the broadcasting of telephone conversations between two politicians which a third party had unlawfully obtained.

9. In *Tonsbergs & Blad A/S v. Norway* (Unreported, European Court of Human Rights, 1st March, 2007) the court held that an award of damages for defamation given by domestic courts in respect of an article published in a newspaper to the effect that a prominent businessman in Norway appeared on a list drawn up by a Municipality, of persons considered to have breached the permanent residence requirements, violated Article 10 of the Convention.

10. In *Kwiecien v. Poland*, (Unreported, European Court of Human Rights, 9th April, 2007) the court held that a decision and sanction of a domestic court against the applicant for an open letter calling on the head of a district office to withdraw from an election was a violation of Article 10 of the Convention.

11. In *Ustun v. Turkey*, (Unreported, European Court of Human Rights, 10th May, 2007) the court held that the conviction and sentencing of the applicant for publishing a book about the life and political views of a left wing revolutionary cinema artist violated Article 10 of the Constitution of the Convention.

53. The foregoing, as is obviously so, is the briefest of summaries of the outcome of these cases. Throughout all of these cases however great emphasis is laid upon the importance of the right to freedom of expression in a democratic society. Going hand in hand with this, is the critical importance of a free press as an essential organ in a democratic society. An essential feature of the operation of a free press is the availability of sources of information. Without sources of information journalists will be unable to keep society informed on matters which are or should be of public interest. Thus there is a very great public interest in the cultivation of and protection of journalistic sources of information as an essential feature of a free and effective press. As between the parties in this case there was no dispute whatever concerning these fundamental aspects of the right to freedom of expression as set out in Article 10 of the Convention.

54. These cases also illustrate on the part of the European Court of Human Rights a stalwart defence of freedom of expression, and a trend of strictly construing potential interferences with that right that might claim justification under the variety of justifiable interferences set out in Article 10(2). This approach by the European Court of Human Rights is particularly evident in cases involving publications relating to political matters. There was no reported case opened to us in which the European Court of Human Rights has upheld an order of a domestic court ordering the disclosure of a journalistic source. In only one case, a decision of the United Kingdom Court of Appeal in the case of *Ashworth Hospital Authority v. MGN Limited* (2001) WLR 2003 is there a judgment of a court directing disclosure of a journalistic source, having considered the balancing under Article 10, of the right to non-disclosure against the competing interest in that case namely the protection of confidential information held by a hospital authority.

55. It is important to bear in mind that where a journalist asserts the right not to disclose or the privilege against non-disclosure, invariably this is not the only right or interest in issue. As in this case the rights and interests of other persons or institutions have also to be considered.

56. That is an exercise that in a democratic society based on the rule of law is reserved to courts established by law for that purpose.

57. As the history of these cases show journalists should have little to fear and certainly no grounds for thinking that their right not to reveal sources does not or would not be given just consideration and vindicated where appropriate.

58. Against this background the deliberate decision taken by the defendants to destroy the documents at issue in this case after they had received a summons to produce these to the Tribunal and after having taken legal advice, is an astounding and flagrant disregard of the rule of law.

59. In so doing the defendants cast themselves as the adjudicators of the proper balance to be struck between the rights and interests of all concerned. This is a role reserved by the Constitution and the law exclusively to the courts. The defendants then proceeded to determine the issue summarily in their own favour, without any consideration of the rights of others or any opportunity given to them to make their case known.

60. It need hardly be said, that such a manner of proceeding is anathema to the rule of law and an affront to democratic order. If tolerated it is the surest way to anarchy.

61. Journalists must realise that paying lip service to democratic values is not enough. They are bound as are all other members of society including politicians and judges, to name but a few, by the Constitution and the laws, to obedience to the law. Journalists are not above the law nor are they entitled to create for themselves, where their own particular vocational interest is involved, a reserve into which the law may not go. Neither are they entitled to usurp the function of this Court as happened here.

62. Although this reprehensible conduct is not brought before this court as a contempt issue and hence no sanction can be imposed in respect of it, nevertheless, the destruction of these documents by the defendants is a relevant consideration to which great weight must be given in striking the correct balance between the rights and interests at issue on this application.

63. The starting point in this balancing exercise is the realisation that in a democratic society the right to freedom of expression is of the highest order of importance. Thus the non-disclosure of journalistic sources enjoys unquestioned acceptance in our jurisprudence and interference in this area can only happen where the requirements of Article 10(2) as set out above are clearly met. The restriction on the exercise of freedom of expression by the disclosure of journalistic sources contended for by the Tribunal must be demonstrated by the Tribunal to be warranted in the context of Article 10(2). First it must be demonstrated that the basis for the interference is one which is "prescribed by law"; secondly, is "necessary in a democratic society" in the interests in this case of "preventing the disclosure of information received in confidence".

64. As already discussed in this judgment we have concluded that the Tribunal does have the legal right to impose and seek to enforce confidentiality in respect of the material which was the subject matter of the communication to the defendants and hence, there is a sound legal basis in law, to justify the interference sought. Additionally in our view, the test set out in the *Sunday Times* case to satisfy the requirement "prescribed by law" namely that the law must be adequately accessible, i.e. the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case and that the norm or rule is formulated with sufficient precision to enable the citizen to regulate his conduct, has been satisfied.

65. The next question which arises is whether or not it is demonstrated that the relief which is sought in these proceedings, restricted as it is now to simply a direction to answer questions, can be said to be necessary in a democratic society for the prevention of the disclosure of information received in confidence in this case.

66. It has to be remembered that the communication in respect of which the defendants refused to answer questions in order to protect the identity of the source is in fact an anonymous and unsolicited communication. In the course of submissions the defendants vividly and eloquently described the nature of and importance of cultivating and protecting sources. *Inter alia* they were described as "delicate blooms" which required exquisite care to ensure their survival and vitality. The defendants further submitted that any risk of disclosure of the identity of sources gave rise to a "chilling" effect so far as the flow of information to newspapers

was concerned. Additionally, it was submitted that if either of the defendants was perceived as a journalist who was willing to disclose or assist in the disclosure of sources, their reputations as journalists would be destroyed and their capacity to earn their livelihood in their chosen profession would be grossly impaired or utterly destroyed.

67. The Tribunal did not take issue with the defendants on any of these contentions but submitted that in this case they were not dealing with a "delicate bloom" which either required cultivation or protection. In their submission, the source of the information in this case being anonymous was entirely outside the class of person requiring protection as a journalistic source.

68. This Court has to consider whether the relief which is sought in this case, namely that the defendants be directed to answer questions concerning the nature of the documents received by them would or could lead to the identification of the source of this material. In our view this is an essential step in assessing whether or not the restriction on the right to freedom of expression contended for by the Tribunal is "necessary in a democratic society … for preventing the disclosure of information received in confidence".

69. In this context the destruction by the defendants of these documents becomes of direct relevance.

70. In respect of anonymous communications, in principle, either the privilege against non-disclosure should not be invoked at all or, if it is to be invoked, only the slightest of weight should be attached to it for the plain reason that if a journalist cannot identify the source of his information it is nonsense to say that there is a professional obligation to protect that source from disclosure.

71. If, of course, the questions to be asked could or would lead to the source or give assistance which could result in the identification of the source then we are satisfied that the privilege against disclosure can be invoked.

72. In this context the court must consider the likelihood, in the circumstances of this case, of the potential answers to the questions to be asked leading to an identification of the source.

73. Because of the destruction of the documents neither the Tribunal nor this Court has the opportunity of examining these documents. Furthermore, these documents cannot be subject to any form of forensic testing which could assist in leading to the source. Thus, the only means the Tribunal has of learning anything about these documents is through the questions which it proposes to put to the defendants. The content of the letter addressed to Mr. McKenna and his reply are of course well known to the Tribunal, therefore nothing is to be revealed in that regard. The only additional information that can be revealed by the defendants is whether or not the version or copy of the letter seen by them had the Tribunal's letter heading on it or whether it was signed. All that this information would do is to indicate whether or not the copy of the letter furnished to the defendants came from inside the Tribunal or from elsewhere. Insofar as answers to these queries would tend to indicate that the documents furnished to the defendants came from elsewhere, it is clear from the evidence given that Mr. McKenna and his solicitor vehemently deny any role in furnishing these documents to the defendants. Thus, in all probability, having regard to the fact that the documents are now destroyed, the most that can be achieved by way of answers to questions proposed to be asked by the Tribunal of the defendants is to indicate that as a matter of probability the Tribunal was not the source of the leak. Beyond that the source will remain, as of course the source always intended, shrouded in impenetrable mystery with its anonymity safely beyond the reach of forensic inquiry.

74. In these circumstances, we are of opinion that because of the destruction of the documents and the consequent deliberate frustration of forensic inquiry thereby brought about, there is little or no risk of the questions proposed to be asked leading to the identification of the source who provided these documents to the defendants. Because of this we are of opinion, therefore, that very slight weight indeed is to be attached to the defendants' privilege against disclosure of their sources in this case.

75. On the other hand, there is the potential of a real benefit to the Tribunal if the answers to the questions give rise to an indication that the Tribunal was not the source of the leak.

76. This is an important matter. In a democratic society inquiries into matters of public interest conducted at the behest of Parliament are an essential tool in the formulation of legislative policy. In our jurisdiction this is done through the Tribunal of Inquiry Acts. A feature of this form of inquiry as set out in the Terms of Reference of the Tribunal is the conducting of an inquiry through a private investigative phase. Essential to the success of this scheme is the maintenance of confidentiality as discussed above. In our view, nothing could be more damaging to the capacity of the Tribunal to carry out its functions than the perception that the Tribunal itself leaked information given to it in confidence. Thus, where a leak occurs as in this case, the Tribunal must inquire to establish the source of that leak as it has sought to do. Establishing that the Tribunal itself was not the source of the leak is in itself a legitimate aim and a pressing social need. At this stage, having regard to the destruction of the documents, the only means remaining to pursue that aim is by way of the proposed questioning of the defendants. If a Tribunal is not enabled to pursue the aim of establishing that it was not the source of the leak, even if it is not able to ultimately identify the source of the leak, the process of public inquiry in private investigative phase will be damaged to such an extent that there would be an inevitable loss of confidence in the integrity of the process and in all probability a significant reduction in the voluntary co-operation of the public in its inquiry.

77. In the circumstances of this case we conclude that the defendants' privilege against disclosure of sources, is overwhelmingly outweighed by the pressing social need to preserve public confidence in the Tribunal and as there is no other means, by which this can be done other than the enquiry undertaken by the Tribunal, we are of opinion that the test "necessary in a democratic society" is satisfied.

78. Accordingly, we will grant the relief sought.