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THE HIGH COURT
JUDICIAL REVIEW

2008 No. 150 J.R.

DIVISIONAL COURT
BEFORE
THE PRESIDENT
MR. JUSTICE KELLY
MR. JUSTICE O'NEILL

BETWEEN

BERTIE AHERN

APPLICANT

AND

HIS HONOUR JUDGE ALAN MAHON, HER HONOUR JUDGE MARY FLAHERTY, HIS HONOUR JUDGE GERALD KEYES MEMBERS OF THE TRIBUNAL OF INQUIRY INTO CERTAIN PLANNING MATTERS AND PAYMENTS

RESPONDENTS

Judgment of Mr. Justice Kelly delivered on the 8th day of May, 2008

Introduction

1. The applicant (Mr. Ahern) is a member of Dáil Éireann and was, until earlier this week, the Taoiseach.

2. The respondents are Circuit Court judges who are the members of the Tribunal of Inquiry into Certain Planning Matters and Payments (the Tribunal). The Tribunal was established in November, 1997.

3. When leave was sought to commence these proceedings on the 11th February, 2008, three issues were raised by Mr. Ahern for consideration by the court. All of them related to aspects of the Tribunal's dealings with Mr. Ahern whose affairs, insofar as they fall within the mandate of the Tribunal, are under investigation by it.

4. The three issues concerned;

> (a) The Tribunal's entitlement to examine Mr. Ahern in respect of statements made by him in the National Parliament (the Parliamentary Privilege Issue);
>
> (b) Mr. Ahern's entitlement to claim privilege in respect of communications between his legal advisors and an expert retained by him for the purpose of the Tribunal's proceedings (the Legal Professional Privilege Issue); and
>
> (c) The obligation of the Tribunal to provide Mr. Ahern with certain documents identified at para. (D) 11 of the statement grounding the application for judicial review (the Disclosure issue).

5. Leave was given for all three issues to be the subject of this judicial review.

6. On the opening day of the hearing, the Court was informed that documents falling within the ambit of para. (D) 11 of the Statement of Grounds had that morning been furnished by the Tribunal to Mr. Ahern's solicitor. The documents consisted of 65 pages of bank data and figures together with a narrative report and 50 pages of computer programming assessment together with a report. That material was reviewed by Mr. Ahern's counsel who were satisfied with it and as a result indicated that no relief was being sought on the Disclosure issue.

7. I will now proceed to consider the two remaining issues.

The Parliamentary Privilege Issue

(A) Background

8. In order to understand how this issue arises it is necessary to summarise the relevant facts.

9. The Tribunal is enquiring into the nature and sources of certain lodgements that were made by Mr. Ahern or persons with whom he is associated to bank accounts held by him or by persons with whom he is associated. The Tribunal sought information concerning loans provided by specified persons to Mr. Ahern in 1993 and 1994. That information was sought as part of the private phase of the Tribunal's inquiries.

10. Those loans became the subject of newspaper publicity in September, 2006. The publicity arose because of unauthorised disclosure by unknown persons of confidential matter generated during the course of the Tribunal's private enquiries.

11. Following that publicity, Mr. Ahern made statements to the media and in the Dáil on the topic. Four such Dáil statements of the 27th September, 3rd October, 4th October and 5th October, 2006 are of interest to the Tribunal.

12. They figured in correspondence between Mr. Ahern's solicitors and those of the Tribunal commencing in October, 2006 and ending in December, 2006. That correspondence demonstrates a difference between the parties on what the Tribunal might be entitled to do concerning these utterances in the Dáil in circumstances where it was of the view that Mr. Ahern had been "factually erroneous" in the statements made by him in that chamber and elsewhere.

13. It is not necessary to rehearse this correspondence in detail. It is sufficient to state that Mr. Ahern believed that the Tribunal was seeking to interrogate him about his Dáil statements in breach of Article 15.13 of the Constitution whilst the Tribunal took a different view.

14. The correspondence petered out with a letter from the Tribunal of the 20th December, 2006, which *inter alia* said:

> "The Tribunal reiterates that it is not conducting any interrogation of Mr. Ahern in relation to his Dáil statement, or engaging in any unconstitutional activity. It has drawn Mr. Ahern's attention to matters which it believes have been factually erroneous in the context of public statements made by him in the Dáil or elsewhere. It is noted that he has

chosen not to correct any of the matters drawn to his attention by the Tribunal, including those matters in respect of which he acknowledges he was factually incorrect."

15. Nothing happened for a further year. Mr. Ahern was scheduled to give evidence to the Tribunal on the 20th December, 2007. Three days beforehand, papers were sent to his solicitors by the Tribunal which included extracts from the records of the Dáil for the four dates already mentioned. Mr. Ahern's solicitors reacted by writing a letter on the 19th December, 2007 which stated *inter alia*:

> "My client continues to assert that he is not amenable to the Tribunal in respect of statements made in the Dáil.
>
> In the circumstances, I require confirmation that no questions will be asked of my client regarding statements made in the Dáil by him and that there would be no reference to these statements by the Tribunal whether directly or indirectly and regardless of the document containing any such references."

16. The Tribunal responded by letter on the same day. It said *inter alia*:

> "The principle established in *Attorney General v. Hamilton (No. 2)* [1993] 3 I.R. 227, is that a deputy is not amenable to any authority other than the Houses for utterances first made in the Dáil. The statements made by your client to the Dáil on the issue of his personal finances were all preceded by correspondence and statements made to the Tribunal on this issue. Further, prior to his statements in the Dáil, your client gave numerous statements on radio, television and in the print media on this issue…
>
> As was established in the case of *Howlin v. Morris* [2006] 2 I.R. 321, Article 15.13 has no application where a deputy has previously made statements, the substance of which is repeated in the Dáil."

17. The approach of the Tribunal as suggested in that last quotation has not been maintained in these proceedings. It has adopted a different stance which I will consider presently.

(B) Article 15.13

18. Article 15.13 of the Constitution reads:

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

19. It is the latter part of that article which is relied upon by Mr. Ahern and which has the effect, he argues, of prohibiting the Tribunal from asking him any questions in respect of the relevant utterances which he made in the Dáil but also precludes it from even referring him to those statements whilst he is giving evidence before the Tribunal.

20. Counsel for the Tribunal made it clear that it does not contest the existence of the privilege. The Tribunal will not call into question the statements made by Mr. Ahern in the Dáil. It accepts that it can ask no questions in relation to those statements which call into question their veracity or motivation. In other words, the statements made by Mr. Ahern in the Dáil are immune from criticism by the Tribunal as to their truthfulness or motivation. Likewise, the Tribunal accepts that he is immune from being asked questions in respect of them.

21. What the Tribunal wishes to do is the following. In the event of there being inconsistencies between (a) statements made outside the House and/or (b) evidence tendered to the Tribunal and what was said in the Dáil, the Tribunal wishes to draw Mr. Ahern's attention to such inconsistencies. It contends that there is no prohibition in such circumstances on it making reference to a statement made in the House and drawing it to the attention of Mr. Ahern when giving evidence. Counsel contended that the purpose of so doing was to ensure that the evidence before the Tribunal was complete.

22. Mr. Ahern objects to this. He argues that the Tribunal is precluded from drawing his attention whilst he is giving evidence to the fact that statements made in the Dáil are inconsistent either with the statements made outside the House or those given by him under oath to the Tribunal. But he accepts that what was said by him in the Dáil is a matter of public record. Not merely that, but under the provisions of the Documentary Evidence Act 1925, such statements contained in the official publications of the National Parliament prove themselves in evidence once produced. He also accepts that it is perfectly proper for the Tribunal to record in its report that such statements were made or indeed to reproduce them in whole or in part as part of the report. It will then be for the reader of the report to draw his own conclusions as to whether Mr. Ahern was or was not "factually erroneous" in the statements made by him to the Dáil and, if so, whether such inaccuracies were deliberate or accidental.

23. As is now clear, there is, in fact, very little between Mr. Ahern and the Tribunal. The only issue is whether the Tribunal can draw his attention in the course of giving his evidence to the statements made by him in the Dáil insofar as they may be inconsistent either with his evidence or statements made outside the Dáil. He says that if the Tribunal pursues that course, it represents an indirect and constitutionally prohibited attempt to render him amenable for the statements made by him in the House. He argues that such a course constitutes a breach of the provisions of Article 15.13 either in its own terms or when read in conjunction with Article 15.12. He contends that it is difficult, if not impossible, to conceive of the drawing attention to statements made by a witness in the Dáil which does not, in fact, seek to render that witness amenable to the Tribunal. The process, he says, runs counter to the essence of the guarantee of Parliamentary Privilege.

(C) The legal position

24. Parliamentary Privilege, of the type enunciated in Article 15.13, has a long pedigree. It to be found in Article 9 of the Bill of Rights 1689, and to some extent in the earlier common law. Article 15.13 repeats, with small modifications, the provisions of Article 18 of the Free State Constitution. Indeed, the thrust of its provisions are reflected throughout the common law world. The judgments of Geoghegan J. in the High Court and Finlay C.J. in *Attorney General v. Hamilton (No. 2)* [1993] 3 I.R. 227 are instructive as they set out the history of the provision.

25. In *Attorney General v. Hamilton (No. 2)* [1993] 3 I.R. 227, at p. 250, Geoghegan J. said:

> "I am satisfied, therefore, that a member of the Dáil or Seanad, *cannot be forced either directly or indirectly to give evidence at any tribunal in relation to any utterance made by him in either House* and this would include any questions relating to the disclosure of the sources of information on foot of which the utterances were based. In my view, the

> Constitution recognises that it is of the utmost importance that Members of the Oireachtas should be entitled to raise matters within either House . . . without any fear of . . . or be otherwise answerable in respect of their utterances in the House at the insistence of any court or outside authority. The protection applies to each and every utterance. In the course of a speech in the Dáil, there may be many statements or allegations made and each of them is a separate utterance. The T.D. enjoys the protection of the Constitution in respect of each of those utterances." (My emphasis)

26. That expression of view by Geoghegan J. in this court was expressly described by Finlay C.J. at p. 261 as:

> "A correct and comprehensive analysis of the constitutional position which arises under Article 15 section 12 and Article 15 section 13, and I am satisfied to accept it in its entirety for the purpose of my judgment in this case."

27. Later in his judgment at p. 270 Finlay C.J. described the provisions of Article 15.12 and 15.13 of the Constitution as constituting:

> "A very far reaching privilege indeed to Members of the Houses of the Oireachtas with regard to utterances made by them in those Houses. They represent an absolute privilege and one which it is clear may, in many instances, represent a major invasion of personal rights of the individual, particularly, with regard to his or her good name and property rights.
>
> In addition, this immunity and this privilege constitutes a significant restriction on the important public right associated with the administration of justice of the maximum availability of all relevant evidence, a right which has been particularly emphasised in decisions of this court…"

28. Neither *Attorney General v. Hamilton (No. 2)* or *Howlin v. Morris* deal with the precise issue with which I am concerned here, but assistance can be gleaned from case law elsewhere.

29. The proper interpretation of Article 15.13 has to be informed by the history of Parliamentary Privilege as understood at common law and in the Free State Constitution. As Geoghegan J. observed in *Attorney General v. Hamilton (No. 2)*:

> " . . . I think that the provisions in that Constitution (the Free State Constitution) must be interpreted in the light of the history of the privileges of Parliament as understood in the common law jurisdictions at that time. If it was intended by the Constitution of Ireland, 1937, to qualify those rights, one would reasonably expect that there would be an express provision to that effect, bearing in mind that otherwise the natural assumption must be that they have the same meaning as their equivalents had in the Constitution of 1922."

30. In the absence of an Irish authority which is precisely on point, it is appropriate to examine other common law decisions touching upon the question of Parliamentary Privilege as an aid to the proper interpretation of Article 15.13.

31. Both sides have referred to a decision of the Privy Council in *Prebble v. Television New Zealand* [1994] 3 All E.R. 407 in support of their respective positions.

32. In that case, the Privy Council considered a claim by the defendants in a libel action brought by a member of the New Zealand Parliament that they were entitled to refer to statements made by the plaintiff in that Parliament in support of a plea of justification. Those pleas were to the effect that the plaintiff made statements in Parliament calculated to mislead it or which were otherwise improperly motivated. In the High Court, Smellie J. struck out the allegations and particulars of justification which he held might impeach or question proceedings in Parliament in contravention of the Article 9 of the Bill of Rights 1689. He was upheld by the Court of Appeal. The matter then went to the Privy Council.

33. That Council's advice to the Queen was contained in the opinion of Lord Browne Wilkinson. At p. 332 of the report, he identified alternative interpretations which were sought to be given to Article 9 of the Bill of Rights 1689. He pointed out that in addition to the actual wording of Article 9 itself, there is a long line of authority which supports a wider principle of which that article is merely one manifestation. That principle is that the courts and Parliament are both astute to recognise their respective constitutional roles. So far as the courts are concerned, they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges. He said:

> "According to conventional wisdom, the combined operation of Article 9 and that wider principle would undoubtedly prohibit any suggestion in the present action (whether by way of direct evidence, cross-examination or submission) that statements were made in the House which were lies or motivated by a desire to mislead. It would also prohibit any suggestion that proceedings in the House were initiated or carried through into legislation in pursuance of the alleged conspiracy. However, it is the defendant's case that the principle has a more limited scope. The defendant submits, first, that the principle only operates to prevent the questioning of statements made in the House in proceedings which seek to assert legal consequences against the maker of the statement for making that statement. Alternatively, the defendant submits that Parliamentary Privilege does not apply where it is the Member of Parliament himself who brings proceedings for libel and Parliamentary Privilege would operate so as to prevent a defendant who wishes to justify the libel from challenging the veracity or bona fides of the plaintiff in making statements in the House."

34. In a statement rather reminiscent of the observations made by Finlay C.J. in *Attorney General v. Hamilton (No. 2)* concerning the way in which Parliamentary Privilege may trench upon other rights, Lord Browne Wilkinson said at p.336:

> "Their Lordships are acutely conscious (as were the courts below) that to preclude reliance on things said and done in the House in defence of libel proceedings brought by a Member of the House could have a serious impact on a most important aspect of freedom of speech, viz. the right to the public to comment on and criticise the actions of those elected to power in a democratic society: See *Derbyshire Council v. Times Newspapers Ltd*. [1993] A.C. 534. If the media and others are unable to establish the truth of fair criticisms of the conduct of their elected members in the very performance of their legislative duties in the House, the results could indeed be chilling to the proper monitoring of members' behaviour. But the present case and Wright's case, 53 SASR 416 illustrate how public policy, or human rights, issues can conflict. There are three such issues in play in these cases: first, the need to ensure that the legislature can exercise its powers freely on behalf of its electors, with access to all relevant information; second, the need to protect freedom of speech generally; third, the interests of justice in ensuring that all relevant evidence is available to the courts. Their Lordships are of the view that the law has been long settled that, of these three public interests, the first must prevail."

35. The Privy Council was unequivocal in concluding as follows:

> "…their Lordships are of the view that parties to litigation, by whomsoever commenced, cannot bring into question anything said or done in the House by suggesting (whether by direct evidence, cross-examination, inference or submission) that the actions or words were inspired by improper motives or were untrue or misleading. Such matters lie entirely within the jurisdiction of the House."

36. Whilst that case was, of course, dealing with litigation properly so called, the position is no different in respect of a Tribunal of inquiry.

(D) Conclusions
37. A consideration of the terms of Article 15.13 and the relevant case law demonstrate that the article protects a member of the national Parliament from both direct and indirect attempts to make such a person amenable to anybody other than the Houses themselves in respect of any utterance made in such Houses.

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

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

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

(E) Relief
41. In the light of my findings above, it follows that Mr. Ahern is entitled to a declaration that the Tribunal does not have power to question him in respect of statements made by him in Dáil Éireann or to cause or permit such questioning as prayed for at para. (D) 1 in his grounding statement.

The Legal Professional Privilege issue

(A) Background
42. On the 8th November, 2007, the Tribunal made an Order requiring Mr. Ahern to make discovery on oath of all documents in his power, possession or control relating to his retaining of Mr. Paddy Stronge in connection with his dealings with the Tribunal.

43. It was in April, 2007, that Mr. Stronge was retained by Mr. Ahern in connection with the proceedings of the Tribunal. Mr. Stronge has over forty years experience in banking and is a former Chief Operating Officer of Bank of Ireland, Corporate Banking. He operates a consultancy in banking and financial matters called Philos Ltd. and is a Lecturer in the Smurfit School of Business, at University College Dublin.

44. Mr. Stronge was retained by Mr. Ahern to provide advice and assistance in respect of the banking and financial aspects of the Tribunal's enquiry.

45. On foot of the Tribunal's order, Mr. Ahern swore an affidavit of discovery on the 11th December, 2007. As directed by the Tribunal, the affidavit was sworn in the form which is prescribed in Form 10, Appendix C of the Rules of the Superior Courts 1986.

(B) The Affidavit of Discovery
46. Four documents are disclosed in the first part of the First Schedule to the affidavit. They include a preliminary report of Mr. Stronge which is undated and which was submitted to the Tribunal and a further report of Mr. Stronge dated the 16th October, 2007.

47. 150 documents are identified and described in the second part of the First Schedule of the affidavit. Privilege is claimed in respect of all of them.

48. The affidavit grounds the claim to Privilege in the following terms:

> "5. I object to producing the documents set forth in the second part of the First Schedule hereto on the grounds that I am advised and believe that they are the subject of legal professional privilege in that, inter alia, they constitute confidential communications for the purposes of obtaining, receiving or providing legal advice in connection with the proceedings of the Tribunal and/or confidential communications between me, my lawyers and/or my agents and/or experts retained on my behalf, the sole/dominant purposes of which were the giving of advice/instructions in order to obtain, receive or provide legal advice for and/or in contemplation of and/or in connection with and/or for the purpose of preparing for the proceedings of the Tribunal (including the giving of evidence in connection therewith and the examination of witnesses thereat) and/or for and/or in contemplation of and/or in connection with and/or for the purposes of preparing for legal proceedings arising therefrom."

49. All of the documents in respect of which privilege is claimed arise in connection with Mr. Stronge and the work undertaken by him.

50. Later in the affidavit Mr. Ahern swears:

> "On foot of advice received from the lawyers acting on my behalf, I decided that it was necessary to retain an expert in banking matters to enable my lawyers to provide legal advice to me in relation to the enquiries and proceedings of the Tribunal and to prepare for and act on my behalf in those proceedings and to prepare for reasonably apprehended litigation resulting therefrom. In these circumstances, my lawyers retained Mr. Paddy Stronge, a former senior bank official and consultant. I have never met or dealt directly with Mr. Stronge; his dealings in connection with my affairs have been conducted through my lawyers. The work of Mr. Stronge was confidential and private and I was of the clear view and intention that it was carried out solely in connection with my involvement at the Tribunal.

> Mr. Stronge analysed the banking evidence and information that was received by me in connection with the Tribunal. On foot of that analysis, he advised my lawyers for the purposes of enabling them to provide legal advice to me and to prepare for and act on my behalf in the proceedings of the Tribunal (including the making of submissions to the Tribunal and examining witnesses, particularly witnesses from AIB bank). Arising also from that work, a firm of actuaries was consulted to advise on certain mathematical aspects of Mr. Stronge's work. The engagement of Mr. Stronge commenced in late April, 2007 after the private interview to which I referred above and continues to date."

51. All 150 documents are the subject of a claim to litigation privilege. In addition, eleven of them are said to be protected by legal advice privilege.

(C) The Tribunal's Response

52. On the 30th January, 2008 the Tribunal wrote a long letter to Mr. Ahern's solicitors. It was by way of response to both the affidavit of discovery and written submissions which had been made by Mr. Ahern in support of the claim to privilege. In summary, the Tribunal decided that as a matter of principle, litigation privilege does not arise in the context of proceedings before it and that a claim for legal advice privilege was not established. I do not propose to reproduce this letter in its totality but certain elements of it are germane to the issues which I have to decide.

53. Having rejected the claim that Mr. Ahern had a reasonable apprehension of litigation, the Tribunal went on to say the following:-

> "Insofar as it is being contended that Litigation Privilege attaches to the proceedings of the Tribunal itself, as opposed to reasonably apprehended litigation arising therefrom, it is the view of the Members that such a contention is not borne out by a consideration of the relevant case law and the principle underlining the development of Litigation Privilege.
>
> On a proper consideration of the case law in this jurisdiction touching upon the issue of Legal Professional Privilege in the context of the proceedings of inquisitorial bodies such as the Tribunal it is clear that none of the cases addressed the question as to whether Litigation Privilege arises in the context of proceedings of inquisitorial bodies. For example, as was correctly identified in your written submissions, the issue in *Miley v. Flood* was the scope of Legal Advice Privilege. Accordingly, as is clear from the reliance placed upon it in your written submissions it is necessary to consider the judgments of the House of Lords in *Three Rivers District Council v. Governor and Company of the Bank of England (No. 6)*, in which case the single issue of the scope of Legal Advice Privilege in the context of the proceedings of an inquisitorial body had to be decided. The Tribunal notes the extracts from the judgment of Lord Scott relied upon in your written submissions in support of the contention that Litigation Privilege attaches to the proceedings of the Tribunal. However, those extracts are taken from a section of the judgment of Lord Scott entitled 'The Scope of Legal Advice Privilege'. Accordingly, the Members are of the view that those extracts afford no guidance in answering the question as to whether Litigation Privilege arises in the context of the proceedings of an inquisitorial body."

54. The letter then went on to quote a passage from the speech of Lord Scott together with a further passage from the speech of Lord Rodger in the same case. The letter concluded with the Tribunal's view that litigation privilege does not arise in the context of the proceedings of the Tribunal.

55. The Tribunal also contended in its letter that the documents in question were not created for the sole or dominant purpose of reasonably apprehended litigation. Rather, they were created for Mr. Ahern's ongoing dealings with the Tribunal and not litigation with it.

56. The letter then went on to consider Legal Advice Privilege. It cited a number of authorities and concluded that:

> "…Legal Advice Privilege can only attach to communications and documents passing between the lawyer and the client. Communications with, and documentation generated by, third parties do not benefit from Legal Advice Privilege."

57. The letter noted that Legal Advice Privilege is claimed in respect of eleven documents and that all but one of them records the involvement of Mr. Stronge. The Tribunal concluded that Legal Advice Privilege would not attach to those documents. Insofar as the remaining document (document no. 9) was concerned, that was a communication with the Taoiseach's office. The claim to Legal Advice Privilege on that was also disallowed. The basis for that appears to be because a distinction was drawn in the affidavit of discovery between Mr. Ahern and his office and consequently, the document being one referable to an individual or individuals in the office and they being a third party in relation to Mr. Ahern's affairs, Legal Advice Privilege does not attach.

58. With this letter the battle lines were drawn between the parties and this judicial review ensued.

(D) Legal Professional Privilege

59. Documents which attract Legal Professional Privilege are immune from inspection and or disclosure of their contents to the other side or to the court in litigation.

60. In *Duncan v. Governor of Mountjoy Prison* [1997] 1 I.R. 558 I cited with approval, as representing the correct legal position in this jurisdiction, a dictum of Lord Taylor in *R. v. Derby Magistrates Court Ex parte B* [1996] 1 A.C. 487 where he said:-

> "The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal Professional Privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests."

61. In *Miley v. Flood* [2001] 2 I.R. 50 I expressed similar views and pointed out that the fundamental nature of Legal Professional Privilege was recognised by courts of other jurisdictions in the common law world and is also protected by the European Convention on Human Rights. I concluded:-

> "This short survey of the international scene demonstrates that in all of the leading common law countries, Legal Professional Privilege exists and is regarded as being very much more than a rule of evidence. Rather, just as in this jurisdiction, it constitutes an essential condition upon which the administration of justice rests. In the context of European human rights it is protected by article 6 of the European Convention on Human Rights."

62. Legal Professional Privilege can be divided into two sub-classes. They are Litigation Privilege and Legal Advice Privilege. Both are

part of a single Privilege.

63. Legal Advice Privilege protects a person and his legal advisor in respect of such advice whether proceedings are in being or contemplated or not.

64. Litigation Privilege only arises where proceedings are in existence or contemplation. As I hope to demonstrate in a moment, this sub class of Privilege encompasses a wider class of communications such as those between legal advisor and potential witnesses.

65. The Tribunal does not contest either the existence or nature of Legal Professional Privilege. But it says that Litigation Privilege is confined to litigation and has no application in respect of the proceedings of the Tribunal. That is the principal issue that falls to be determined in respect of the 150 documents in respect of which a claim to Litigation Privilege is made.

(E) Litigation Privilege
66. It is important to understand what Litigation Privilege means in the context of the commissioning of an expert such as Mr. Stronge. It is well summarised in the following passage from Passmore on Privilege (2nd Ed., 2006 para. 3. 109)

> "Traditionally, whenever a professional third party has been engaged as an expert witness by or on behalf of a party to actual, pending or contemplated proceedings, Litigation Privilege has protected: (i) confidential communications between any of the client, his solicitors or counsel and the expert, and (ii) the work of the expert prior to its disclosure or use in the litigation, so long as those communications or the expert's work are referable to the litigation concerned and satisfy the dominant purpose test. This is so, whether the expert has been instructed with a view to assisting his client to understand, for example, the technical aspects of a claim, to assist in the preparation of a claim or its defence, or to provide expert evidence at the trial of the action."

67. This makes it clear that Legal Professional Privilege extends to documents generated in connection with the instruction and retention of an expert witness, provided of course that they are prepared for the purpose of that litigation. Thus, it follows that all 150 documents which are the subject of the Litigation Privilege in this case would attract such Privilege were Mr. Ahern involved in litigation properly so called. The net question is can he claim that Privilege as a person whose affairs are under examination by the Tribunal?

68. The Tribunal answers that question in the negative whilst Mr. Ahern contends for the polar opposite.

(F) The Tribunals of Inquiry (Evidence) Act 1921 (the Act)
69. The Tribunal was set up under the provisions of the Act.

70. Section 1(3) of the Act provides:-

> "A witness before any such Tribunal shall be entitled to the same immunities and privileges as if he were a witness before the High Court or the Court of Session."

71. Section 1(4) of the Act as inserted by s. 2 of the Tribunals of Inquiry (Evidence) (Amendment) Act 1997 provides:-

> "A person who produces or sends a document to any such Tribunal pursuant to an order of that Tribunal shall be entitled to the same immunities and privileges as if he or she were a witness before the High Court."

72. The Tribunal contends that a tribunal of inquiry under the 1921 Act involves a wholly different process – conceptually, legally and practically, from that of a legal action. It says it is not engaging in the administration of justice and is inquisitorial in nature. The Tribunal argues that there is no basis for extending Litigation Privilege to Mr. Ahern who is a witness before it.

73. The only directly relevant authority in this jurisdiction on this topic is in the form of a ruling delivered by the tribunal of inquiry chaired by Moriarty J. on the 21st February, 2008. In that ruling, he had to consider the question of whether the conduct of an inquiry pursuant to statute overrode a claim to Legal Professional Privilege. In the course of his ruling, Moriarty J. said this:-

> "45. It is the Tribunal's view that it follows from the provisions of both s. 1(3) and s. 1(4) of the 1921 Act, that a person who produces documents to a Tribunal either under compulsion of an order of the Tribunal, or voluntarily, does so on the same footing, and with the self same immunities and privileges as a party disclosing documentation in the course of High Court proceedings.
>
> 46. Whilst the Tribunal has been referred to authorities, including a decision of the Privy Council in the New Zealand case *of B. v. Auckland District Law Society* and of the Court of Appeal *in Three Rivers District Council v. Governor and Company of the Bank of England (No. 6)*, neither of those authorities addressed the specific statutory scheme under consideration, and in particular s. 1(4) of the 1921 Act."

74. Moriarty J. continued:-

> "48. It has never been doubted by the courts in this jurisdiction that persons before Tribunals of Inquiry are entitled to invoke Legal Professional Privilege on the same basis as parties to proceedings before the High Court."

75. In conclusion Moriarty J. said:-

> "53. Having regard to all of the foregoing considerations, the Tribunal is satisfied that it is clear, by virtue of s. 1 of the Tribunals of Inquiry (Evidence) Act 1921 that a party appearing before a Tribunal is entitled to the self same privileges (including Legal Professional Privilege) as a party to litigation before the High Court. Section 1(3) and 1(4), both individually and collectively, constitute 'privilege preservation provisions' as described by Passmore."

76. If that statement of the law is correct then Mr. Ahern's contention ought to succeed.

(G) *Witness v. Party*
77. It is clear that s. 1(3) of the Act provides the same immunities and privileges to a witness before a tribunal as if he were a witness before this court. Section 1(4) gave the same immunities and privileges to a person who produces or sends a document to a tribunal as if that person were a witness before this court.

78. Witnesses simpliciter before this court enjoy privileges such as a privilege against self-incrimination. But they do not enjoy Litigation Privilege in respect of contact with third parties concerning their participation as a witness. That is confined to parties to the litigation. The Tribunal argues that Mr. Ahern is just a witness before the Tribunal and that entitlements given by s. 1(3) and 1(4) of the Act do not confer Litigation Privilege on him. The Tribunal points out that, had it wished, the legislature could have provided for a witness before a tribunal of inquiry having an entitlement to Litigation Privilege. It did not.

79. This argument of the Tribunal focuses attention on the precise legal status of Mr. Ahern before it.

(H) Mr. Ahern's legal status at the Tribunal
80. On a simple view of the matter it might be said that Mr. Ahern is nothing more than a witness before the Tribunal. But that view is as incorrect as it is simple.

81. Mr. Ahern is a person whose conduct is under examination by the Tribunal. As such, he is entitled to certain fundamental constitutional rights which were identified as far back as 37 years ago in the decision of the Supreme Court in In *Re Haughey* (1971) I.R. 217. The Tribunal accepts that Mr. Ahern is a person to whom the rights identified by the Supreme Court in that case apply.

82. Ó Dálaigh C.J. pointed out in *Re Haughey* that Mr. Haughey was more than a mere witness. He said:-

> "The true analogy, in terms of High Court procedure, is not that of a witness but of a party. Mr. Haughey's conduct is the very subject matter of the committee's examination and it is to be the subject matter of the committee's report."

83. In the present case, Mr. Ahern's conduct is under examination by the committee and he may well feature in the report which the Tribunal will prepare. In such circumstances, Ó Dálaigh C.J. identified "the minimum protection which the State should afford" to Mr. Ahern as:-

> "(a) that he should be furnished with a copy of the evidence which reflected on his good name;
>
> (b) that he should be allowed to cross examine, by counsel, his accuser or accusers;
>
> (c) that he should be allowed to give rebutting evidence;
>
> (d) that he should be permitted to address, again by counsel, the tribunal in his own defence."

84. All of these rights derive from the protection afforded by Article 40.3 of the Constitution to an individual. Those personal rights include the right to one's good name, the right to fair procedures and the right to natural and constitutional justice.

85. Whilst the Tribunal is correct in saying that it is not involved in the administration of justice because it fulfils none of the fundamental conditions or characteristics of the administration of justice as laid down by Kenny J. in *McDonald v. Bord na gCon* [1965] I.R. 217, nonetheless it does have an adjudicatory function and may well affect Mr. Ahern's entitlements to his good name.

86. The adjudicatory function of a statutory inquiry and the necessity for legal protection in respect of persons who may be affected by such was asserted both in the decisions of this court and the Supreme Court in *Maguire v. Ardagh* [2002] 1 I.R. 385. The report of a tribunal has the potential to have serious and damaging effects for the persons called before it. That much is accepted by the Tribunal in this case, since it does not contest the entitlement of Mr. Ahern to the rights identified in In *Re Haughey*.

87. It would, in my view, be anomalous and make little sense if a person to *whom Re Haughey* rights applies could not assert an entitlement to Litigation Privilege. A person appearing before a tribunal of inquiry and to whom *Re Haughey* rights apply is to be regarded as being in the same position as a party to High Court litigation and not a mere witness from the point of view of Legal Professional Privilege.

88. In *Martin v. Legal Aid Board* (Unreported, 23rd February 2007) Laffoy J. said:-

> "Legal Professional Privilege is usually, but not invariably, in issue in the context of discovery in *inter partes* litigation, where disclosure to an adversary is at issue. However, it also arises in other contexts, for example, in an inquisitorial process such as a tribunal of inquiry, as happened in *Miley v. Flood*."

89. In my view, Litigation Privilege extends to a witness before a tribunal of inquiry whose conduct is under examination and who, as a result, has acquired rights such as those identified in In *Re Haughey.* Mr. Ahern is such a person.

90. This view of the matter is largely formed by reference to the constitutional entitlements of such a person. But I believe that the view is also supported by reference to decisions from other jurisdictions which do not have constitutional entitlements such as we have in this State.

(I) English Decisions
91. The Tribunal attaches a good deal of weight in support of its contentions to two English decisions.

92. The first in time is the majority decision of the House of Lords in *Re L* [1997] 1 A.C. 16. In that case, their Lordships had to consider whether a report prepared by a medical expert on the instructions of a solicitor in care proceedings brought pursuant of the Children's Act 1989, was properly the subject of Legal Professional Privilege.

93. The Law Lords held by a 3/2 majority that Litigation Privilege did not apply to such proceedings. The reason for that was that proceedings under the Children's Act in which the interest of the child was paramount were non-adversarial in character. Litigation Privilege was, in the view of the majority, applicable only in adversarial proceedings. Lord Jauncey, who delivered the majority speech, held that Litigation Privilege was an essential component of adversarial procedure. If proceedings under the Children's Act were "essentially adversarial in their nature", then he held that "Litigation Privilege must continue to play its normal part". If, however, they were not, then different considerations might apply.

94. It is clear from a consideration of his speech that the decision is narrowly confined to procedures which apply under the Children Act in England. He said:-

> "I consider that care proceedings under part IV of the Act are so far removed from normal actions that Litigation Privilege

has no place in relation to reports obtained by a party thereto which could not have been prepared without the leave of the court to disclose documents already filed or to examine the child."

95. The principal basis for so concluding was that the proceedings were non-adversarial and so the notion of a fair trial between opposing parties assumed less importance. Furthermore, the court, in such proceedings, was seeking to reach a decision in the best interest of someone who is not a direct party and is granted investigative powers to achieve that end.

96. It is clear that the decision does not extend to tribunals of inquiry whose function is quite different to the function undertaken by English Courts under part IV of the Children's Act. On that basis alone, the majority view of Lord Jauncey is of little relevance.

97. In any event, I find the reasoning of the minority as enunciated by Lord Nicholls as being much more persuasive. In the course of his speech he said:-

> "Legal Professional Privilege is deeply embedded in English law. This was confirmed recently by your Lordship's House in *R v. Derby Magistrates Ex parte B*. The privilege against non disclosure prevails even where the privileged material might assist the defence of a person charged with murder.
>
> Clear words, therefore, or a compelling context are needed before Parliament can be taken to have intended that the privilege should be ousted in favour of another interest. The Children's Act contains neither. There is no express abrogation of the privilege. Nor do the provisions in the Act, designed to promote the welfare of children, carry with them an implication that in future, parents who become involved in court proceedings are not to have the same normal freedom to consult lawyers and potential witnesses, and to do so confidentially."

98. He continued:-

> "Attaching the bewitching label of inquisitorial to family proceedings says nothing about whether Legal Professional Privilege should or should not be available to a person who is a party to the proceedings.
>
> I can dispose of one point straight away. The expression 'adversarial' carries with it a connotation of confrontation and conflict. Ideally, these characteristics have no place in family proceedings. In family proceedings, all parties should be working together to assist the court in finding the answer which will best promote the welfare of the child. In practice, matters are not so simple. A father who is alleged to have sexually abused his stepdaughter is concerned to protect his own reputation as well as his family life. He can hardly be blamed if he regards the proceedings as no less confrontational and adversarial than other civil proceedings. This feature throws little light, if any, on the present question.
>
> At bottom, the answer to the present question turns on which are the requirements of procedural fairness in the conduct of family proceedings. In this context, the contrast between inquisitorial and adversarial needs handling with care, for at least two reasons. First, the contrast suggest that proceedings are either wholly adversarial or wholly inquisitorial. They partake wholly of the one character or wholly of the other. This is not always so. Proceedings may possess some adversarial features and some inquisitorial features. Family proceedings are an example.
>
> Secondly, and even more importantly, the contrast can all too easily divert attention from the crucial question. Fairness is a universal requirement in the conduct of all forms of proceedings, inquisitorial as much as adversarial, although the requirements of fairness vary widely from one type of proceedings to another. The requirements of fairness depend upon matters such as the nature of the proceedings, the subject matter being considered, the rules governing the conduct of the proceedings, the parties involved, the composition of the Tribunal, and the consequences of the decision. The distinction between the adversarial and inquisitorial nature of the proceedings is no more than one of these elements, although sometimes a very important element. The crucial question is not whether, and to what extent, the proceedings are inquisitorial rather than adversarial. The question to be addressed is what is required if the proceedings are to be conducted fairly."

99. His Lordship then went on to consider the requirements of fairness and said:-

> "Whatever fairness does or does not require in other contexts, in this context a fair hearing includes at least the right to present one's case and to call evidence.
>
> Under English law, an established ingredient of this right is Legal Professional Privilege. Parties preparing for a court hearing may obtain legal advice in confidence. A party cannot be required to disclose communications between himself and his lawyer, or communications between the lawyer and third parties which come into existence for the purpose of obtaining legal advice in connection with the proceedings. A proof of evidence obtained from a potential witness of fact is not disclosable. Nor is a report obtained for a potential witness of expert opinion. A party may be required to produce a witness statement or experts report in advance as a precondition to the admission of that evidence at the hearing, but he is not required to disclose proofs of witnesses whose evidence he does not intend to adduce at the hearing. The public interest in a party being able to obtain informed legal advice in confidence prevails over the public interest in all relevant material being available to courts when deciding cases.
>
> I can see no reason why parties to family proceedings should not be as much entitled to a fair hearing having these features and safeguards as are parties to other court proceedings. Indeed, it must be doubtful whether a parent who is denied the opportunity to obtain legal advice in confidence is accorded the fair hearing which he is entitled under Article 6(1) read in conjunction with Article 8, of the European Convention for the Protection of Human Rights and Fundamental Freedoms."

100. This reasoning seems to me to apply with equal if not more force in the present case. Labelling the procedures of the Tribunal as inquisitorial rather than adversarial cannot be determinative. Neither can the fact that the Tribunal is not engaged in the administration of justice in the sense in which that expression is defined in *McDonald v. Bord na gCon* be of any assistance.

101. The crucial issue is one of fairness. In my view, a witness before a Tribunal who has attracted the rights identified by the Supreme Court in In *Re Haughey* must be entitled to litigation privilege in the same way as any party to an action in this court.

102. The second English decision which is relied upon is that in *Three Rivers District Council v. Governor and Company of the Bank of England (No. 6)* [2005] 1 A.C. 610. That case was concerned with Legal Advice Privilege rather than Litigation Privilege. In reversing

the decision in the Court of Appeal the Law Lords held that legal advice extended to advice as to what should prudently and sensibly be done in a relevant legal context including the presentation of a case to an inquiry by someone whose conduct might be criticised by it. Despite the fact that the case is one of Legal Advice Privilege, nonetheless, some of the comments of the Law Lords inform the question at issue here.

103. For example, Lord Scott in dealing with this presentational advice and having held that it fell squarely within the policy reasons underlying Legal Advice Privilege said:-

> "I would be of the same opinion in relation to presentational advice sought from lawyers by any individual or company who believed himself, herself or itself to be at risk of criticism by an inquiry, whether a coroner's inquest, a statutory inquiry under the Tribunals of Inquiry (Evidence) Act 1921 or an ad hoc inquiry such as the Bingham Inquiry. The defence of personal reputation and integrity is at least as important to many individuals and companies as the pursuit or defence of legal rights whether under private law or public law. The skills of professional lawyers when advising a client what evidence to place before an inquiry and how to present the client and his story to the inquiry in the most favourable light are, in my opinion, unquestionably legal skills being applied in a relevant legal context."

104. Lord Carswell expressed himself as follows (at p. 681):-

> "The work of advising a client on the most suitable approach to adopt, assembling material for presentation of his case and taking statements which set out the relevant material in an orderly fashion and omit the irrelevant is, to my mind, the classic exercise of one of the lawyer's skills. I can see no valid reason why that should cease to be so because the forum is an inquiry or other Tribunal which is not a court of law, provided that the advice is given in a legal context.
>
> The skills of a lawyer in assembling the facts and handling the evidence are of importance in that forum as well as a court of law. The availability of competent legal advice will materially assist an inquiry by reducing irrelevance and encouraging the making of proper admissions."

105. These observations appear to support the notion that the entitlements of Legal Professional Privilege, whether it be Litigation Privilege or Legal Advice Privilege, apply to a person in the position of Mr. Ahern.

(J) Decision

106. In my view, Mr. Ahern was entitled to claim Litigation Privilege in respect of the documents which are set forth in Part II to the First Schedule of his affidavit of discovery. The Tribunal was wrong to conclude that he was not so entitled.

(K) Waiver

107. A somewhat makeweight point on waiver was raised by the Tribunal in submissions. It did not feature in the Notice of Opposition served. The Tribunal argues that even if Litigation Privilege is available to Mr. Ahern (as it is) nonetheless, it is entitled to inspect some at least of the documents in the affidavit of discovery because Mr. Ahern has forfeited his entitlement to Privilege. The basis for this is an argument that he has deployed the documents in question and by so doing has waived the Privilege.

108. The deployment in question is referable to a prepared statement which was made by Mr. Ahern and which was read into the record of the public hearings of the Tribunal on the 13th September, 2007. It was in the course of this statement that Mr. Ahern first made reference to Mr. Stronge. Mr. Ahern said:-

> "My banking expert, chairman, is Paddy Stronge, former Chief Operating Officer of Bank of Ireland Corporate Banking, and he has now confirmed to me, having considered all the banking evidence and examined all the banking documentation, that the evidence does not substantiate a lodgement of $45,000.00".

109. Later on in the same prepared statement Mr. Ahern said:-

> "Again, I am informed by the banking expert that I have retained that there a number of combinations of Irish and Sterling which are about the same as the Irish and Sterling cash sums and I believe were received and which amount to the Irish punt value of the lodgements of 11th October."

110. On the basis of that statement, it is said that Mr. Ahern waived Privilege to some at least of the 150 documents.

111. The Tribunal relies upon the general rule stated in *Matthews and Maleck's* textbook on discovery as quoted by Hardiman J. in *Hannigan v. D.P.P.* [2001] 1 I.R. 378.

112. In that case, the applicant appealed against an order of this court (Morris J.) refusing inspection of a document disclosed by the DPP during the course of judicial review proceedings and over which the DPP claimed privilege. The document was a letter sent by the DPP to gardaí containing directions as to the prosecution of the applicant in District Court proceedings impugned in the judicial review. A considerable portion of the letter in question was referred to in an affidavit which formed part of the judicial review proceedings. The applicant argued that the document was relevant, did not attract Public Policy Privilege or if it did that privilege had been waived. The Supreme Court held that the document had been deployed in the proceedings and that privilege was waived.

113. Hardiman J. approved of the rule on the topic from *Matthews and Maleck* in the following terms:-

> "The general rule is that where privileged material is deployed in court in an interlocutory application, privilege in that and any associated material is waived."

114. Did what Mr. Ahern say in the passages which I have quoted amount to deployment so as to waive the privilege to which he would otherwise be entitled?

115. I do not think so. The reference was in general terms and far removed from what occurred in Hannigan's case.

116. In any event, insofar as Mr. Ahern referred to bank documents they had been circulated by the Tribunal itself. No issue can arise in respect of them.

117. He also referred to communications from Mr. Stronge. Two reports were prepared by Mr. Stronge. The first was a preliminary report which was furnished to the Tribunal. A longer more detailed report was also furnished to the Tribunal in October, 2007. The

second report sets out what Mr. Stronge read and reviewed in connection with its preparation. (See p. 2 of Philos report)

118. Counsel for Mr. Ahern accepts that Mr. Stronge, when he comes to give evidence before the Tribunal, can quite legitimately be asked to give evidence as to the factual material which he used in order to form his opinion. He may also be asked the material instructions which were given to him. But the liceity of that line of questioning does not justify a trawl through the entire of the solicitor's file in advance of his testimony.

119. In my view, it cannot be said that Mr. Ahern waived his entitlement to privilege.

(L) Legal Advice Privilege
120. As I have already pointed out, this form of privilege is claimed only in respect of 11 of the 150 documents. Having come to the conclusion that Litigation Privilege is applicable as is claimed in respect of all 150 documents, it is not necessary for me to consider this question.

(M) Relief
121. Mr. Ahern is entitled to a declaration that he is entitled to claim Legal Professional Privilege in respect of the documents set forth in the second part of the First Schedule to his affidavit of discovery sworn on the 11th December, 2007. *Certiorari* will also go to the determinations of the Tribunal of 30th January and 6th March, 2008 which disallowed such claim and required production of those documents.