

23rd April 1999

Tribunal of Inquiry into Certain Planning Matters and Payments

DECISION

In the matter of a claim of privilege by the Criminal Assets Bureau

Introduction

1. This tribunal of inquiry was established by instrument of the Minister for the Environment and Local Government dated the 4th November 1997. That instrument was subsequently amended and extended by a further instrument dated the 15th July 1998.
2. The terms of reference of this tribunal of inquiry require certain definite matters of public importance to be urgently inquired into by this tribunal. Those definite matters include matters with both a criminal law and a revenue law aspect. It is unnecessary for the tribunal to particularise the matters of criminal law or revenue law which have in fact been discovered in the course of this inquiry. It is sufficient for the purposes of this decision to refer to the wording of paragraphs A3.2, A5, and E1 and E2 of the terms of reference. The matters particularised in those paragraphs plainly venture into the areas of criminal law and tax law.
3. The terms of reference of this tribunal of inquiry constitute a mandate from the Oireachtas to establish the material facts, in public, pertaining to those matters.

4. In the proper discharge of the mandate of the Oireachtas the Tribunal made an Order on the 26th January 1999 directing Mr. George Redmond to make discovery on oath, and to produce, certain documentation to the tribunal. This Order was made on consent. In furtherance of this Order Mr. Redmond provided the tribunal with a letter authorising a financial institution in the Isle of Man to disclose certain documentation to the tribunal.
5. On the 19th February 1999 the tribunal made a second, and much more extensive Order requiring, inter alia, Mr. Redmond to make discovery on oath and to produce certain documentation to the tribunal.
6. These two Orders of the tribunal have not been complied with and it is to the circumstances affecting that non-compliance that this decision is addressed.

The parallel investigation by the Criminal Assets Bureau

7. On the evening of the 19th February 1999 it appears that Mr. George Redmond was arrested by members of An Garda Siochana attached to the Criminal Assets Bureau at Dublin Airport as he disembarked from a flight returning from the Isle of Man. It appears that certain documentation in the possession of Mr. Redmond at this time was taken from him by the Gardai concerned. It also appears that members of An Garda Siochana attached to the Criminal Assets Bureau entered Mr. Redmond's home on the same date and seized certain documentation there.

8. On the 22nd February 1999 Mr. Redmond explained to the tribunal that he was in default in relation to the tribunals orders for discovery and production because the Criminal Assets Bureau had seized the documentation that he wished to provide to the Tribunal.
9. On the same date Mr. Redmond wrote to the Chief Bureau Officer indicating his express consent to the tribunal being furnished with copies of the documentation seized by the Bureau. The Tribunal also wrote to the Bureau on the same date urgently seeking copies of the documentation concerned.
10. The Bureau has adopted the position in correspondence with the tribunal that they would not furnish copies of the documentation requested, nor were they in a position to say when that situation might change.
11. In arriving at this position it appears that the Bureau had consulted with the Director of Public Prosecutions.
12. The tribunal made an Order on the 13th April 1999 requiring the Chief Bureau Officer to attend at a proceeding of the tribunal and to produce the documentation listed in the schedule to that Order.
13. The tribunal received a reply from the Chief Bureau Officer on the 14th April 1999 where he indicated his intention not to comply with the Order of the tribunal on the ground that he was "... strongly of opinion that it would not be proper for (him) to furnish this material during the currency of the investigations being carried out by the Bureau and until proceedings consequent on

those investigations are determined.” It is clear that future consideration as to whether, or not, the Chief Bureau Officer would consider making this documentation available to the tribunal is years, rather than months away.

Evidence before the tribunal

14. The tribunal heard evidence in this matter on the 16th April 1999 and the relevant evidence is contained in Volume 40 at pages 1 to 22 of the transcript of the proceedings of this tribunal.
15. I do not propose to set out the text of that evidence in this decision but that evidence is to be treated as a part of this decision. I will, however, highlight certain aspects of that evidence later in this decision.

Legal submissions before the tribunal

16. The tribunal heard legal submissions in this matter on the 19th April 1999 from the tribunal legal team, the Criminal Assets Bureau, the Attorney General and Mr. George Redmond. The relevant submissions are set out in Volume 41 at pages 7 to 51 of the transcript of the proceedings of this tribunal.
17. I do not propose to set out the text of those submissions in this decision but those submissions are to be treated as part of this decision. I will, however, highlight certain aspects of those submissions later in this decision.

The claim of privilege

18. At the outset I wish to compliment Mr. O'Reilly, S.C. and Mr. Galligan BL who are instructed by the Attorney General to appear on behalf of the public interest before this tribunal. Their submissions have been of considerable assistance to the tribunal in deciding the question of privilege advanced by the Criminal Assets Bureau.
19. The evidence tendered by the Criminal Assets Bureau in support of the claim of privilege that they seek to assert over the documentation concerned was less than satisfactory. In effect the Bureau would do no more than repeat the terse position they had previously adopted in correspondence.
20. Mr. O'Reilly correctly, in my view, described this as an attempt to assert a class privilege over documentation. He also pointed out that the Supreme Court in a line of recent decisions has expressly decided that this type of approach is inappropriate. The Bureau nonetheless has expressly declined to adduce any evidence in support of their claim of privilege other than the "class" approach.
21. Mr. Butler, S.C., on behalf of the Bureau, submitted to the tribunal that he had been specifically instructed not to make submissions to the tribunal in relation to the privilege that his client sought to assert in the tribunal. The Criminal Assets Bureau consider that because the tribunal is an inquiry rather than a Court it is biased in hearing and deciding on their claim of privilege because it has "predetermined" the necessity for the

documentation. The Bureau argue that only a Court can hear and decide a claim of privilege asserted by them. This argument goes to the root of the ability of a tribunal of inquiry to obtain documentation and information. The Bureau have also made clear that if the tribunal does not agree with their view they will institute proceedings in the High Court for a judicial review.

Decision

22. I am not satisfied that the tribunal should accede to the claim of privilege asserted by the Criminal Assets Bureau in respect of the documentation detailed in the schedule to the Order made by the tribunal on the 13th April 1999. I am satisfied that the Order was properly made and that no adequate factual or legal basis has been advanced by the Bureau in support of its claim of privilege.
23. The argument advanced by the Bureau is in reality an argument as to jurisdiction. The Bureau claims that this tribunal has no power to consider their claim of privilege. This argument makes no sense if regard is had to the provisions of the Tribunals of Inquiry (Evidence) Acts 1921 to 1998 which provide a variety of express statutory powers to a tribunal of inquiry in relation to the production of documents. The position of the Criminal Assets Bureau is in clear conflict with the Supreme Court decisions cited by Mr. O'Reilly. The Bureau expressly declines to explain the legal or factual basis for the view that they assert. This approach is, in my experience, unique for a statutory authority in this State. No other State authority, including An Garda Siochana, have adopted this position in relation to the production of documentation to the Tribunal. Where

those authorities have made claims of privilege they have seen no obstacle to the issue of privilege being determined in the tribunal.

Additional observations

24. The tribunal considers that there is a very serious issue of public interest underlying the approach of the Criminal Assets Bureau to the inquiry work of this tribunal. This tribunal was established by the Oireachtas to establish the facts of the matters set out in its terms of reference. A tribunal of inquiry is only established as a matter of last resort when any other form of investigation or inquiry is considered unsuitable or to have failed. The tribunal is required to inquire in public into the facts. The tribunal is not concerned with questions of individual criminal or civil accountability. Section 5 of the Tribunals of Inquiry (Evidence) (Amendment) Act 1979 expressly provides that evidence heard at proceedings of a tribunal is immune from being adduced in criminal proceedings. A tribunal of inquiry is not a mechanism to assist or facilitate other State agencies to discharge their functions.
25. The Criminal Assets Bureau appears to have commenced a parallel investigation into the same matters detailed in the terms of reference of this inquiry.
26. This situation has a significant bearing on the effectiveness, the expedition and the cost of this inquiry.
27. The Tribunal considers that there is a real likelihood that where it is discovered, for example, that the inquiries undertaken by the tribunal touch on matters of

criminal or revenue law there will be a repetition of this situation.

28. The tribunal intends to send an interim-report on this matter to the Oireachtas in early course.

Mr. Justice Feargus Flood,
Sole Member,
Tribunal of Inquiry into Certain Planning Matters and
Payments,
23rd April 1999.