



**Tribunal of Inquiry
Into Certain Planning Matters and Payments**

Appointed by Instrument of The Minister for the Environment
and Local Government dated the 4th day of November 1997
as amended by Instrument dated the 15th day of July 1998

**Proposed Orders against personnel of Anglo Irish Bank
Corporation Plc.**

**RULING on Submissions made on behalf of Michael Bailey,
Thomas Bailey and Bovale Developments Ltd.**

OF

**THE SOLE MEMBER
Mr. JUSTICE FEARGUS M. FLOOD**

6th May 1999

RULING
on Submissions made on behalf of Michael Bailey, Thomas
Bailey and Bovale Developments Ltd.

The circumstances in these matters follows:-

1. On 25th May 1998, I made orders requiring the Attendance for interview of officers of Anglo Irish Bank Corporation Plc., pursuant to which interviews took place.
2. As a result of Supreme Court decisions in the cases of Haughey v Moriarty and Bailey v Flood on 28th July 1998, I rescinded various orders, which I had previously made.
3. Transcripts of the interviews conducted pursuant to the orders of 25th May 1998 are held by Michael Bailey, Thomas Bailey and Bovale Developments Ltd. and by Anglo Irish Bank Corporation Plc.
4. Michael Bailey, Thomas Bailey and Bovale Developments Ltd. have refused consent to the use by the Tribunal of the transcripts of the interviews.

5. On 19th February 1999, the Tribunal wrote to Messrs. Smith Foy & Partners who act on behalf of Michael Bailey, Thomas Bailey and Bovale Developments Ltd. to notify them that I would consider making orders for the interview of personnel in Anglo Irish Bank Corporation Plc in connection with the contents of the documents discovered by the bank to the Tribunal. Messrs. Smith Foy were invited to furnish written submissions in relation to the proposed orders.

6. The written submissions were contained in a letter from Smith Foy to the Tribunal dated 23rd February 1999 which states as follows:

"We note that the Sole Member proposes to make orders against our clients' bank (Anglo Irish Bank Corporation Plc) in connection with the interview of certain officers of that bank.

We respectfully submit that a Tribunal of Inquiry has no power to make such an order. The relationship between banker and customer is protected under the constitution and any

interference with this relationship requires either the consent of the customer or express statutory authority. For the avoidance of doubt, our clients do not consent to the holding of interviews with their bankers. In the absence of such consent, there is no statutory basis for the proposed interviews. It is of the essence of a Tribunal of Inquiry that it be conducted in public; the relevant legislation envisages the taking of evidence on oath in public and does not allow for the enforced "interview" in private of witnesses.

We note with concern the criticism of the refusal of our clients to consent to use of the transcripts obtained on foot of the unconstitutional orders of May and June of last year (1998) contained in the first paragraph of your letter. The Sole Member quite properly took the view, arising out of the decision of the Supreme Court in Bailey v Mr. Justice Flood 28th July 1998, that he should not rely on any information garnered in breach of our clients' constitutional rights. In the circumstances, we do not understand the suggestion that our clients' refusal to waive their rights in this regard in some way represents a failure to co-operate with the Tribunal, and would ask you to withdraw this suggestion".

The Power of the Tribunal to make an Order compelling the attendance for interview of personnel of Anglo Irish Bank Corporation Plc.

Section 1(1) of the Tribunals of Inquiry (Evidence) Act 1921 provides as follows:-

"1(1) Where it has been resolved (whether before or after the commencement of this act) by both houses of Parliament that is expedient that a tribunal be established for inquiring into a definite matter described in the resolution as of urgent public importance, and in pursuance of the Resolution a tribunal is appointed for the purpose either by His Majesty or a Secretary of State, the instrument by which the tribunal is appointed or any instrument supplemental thereto may provide that this Act shall apply, and in such case the tribunal shall have all such powers, rights, and privileges as are vested in the High Court, or in Scotland the Court of Session, or a judge of either such court, on the occasion of an action in respect of the following matters:-

- a) *The enforcing the attendance of witnesses and examining them on oath, affirmation, or otherwise;*
- b) *The compelling the production of documents;*
- c) *Subject to rules of Court, the issuing of a commission or request to examine witnesses abroad;”*

The powers which are vested in the High Court in respect of the enforcing the attendance and examination of witnesses are contained in Order 39 of the Rules of the Superior Courts. Order 39 Rule 4 provides as follows:-

“4. The Court may, in any cause or matter where it shall appear necessary, make any order for the examination upon oath before the court, or any officer of the Court, or any other person, and at any place, of any witness, and may allow the deposition of such witness on such terms (if any) as the Court may direct.”

It appears to me, having regard to this provision, that the Tribunal has power to direct Personnel of Anglo Irish Bank Corporation Plc. to make an order for the examination of Personnel of Anglo Irish Bank Corporation Plc. on oath by Counsel to the Tribunal insofar as I have decided that he is to be a witness before the Tribunal.

Section 4 of the Tribunals of Inquiry (Evidence) Act 1979 provides as follows:-

“A tribunal may make such orders as it considers necessary for the purposes 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.”

This section was considered by the High Court in the case of Damien Kiberd & Anor v The Honourable Mr. Justice Liam Hamilton (Chairman and Sole Member of the Tribunal of Inquiry into the Beef Processing Industry) [1992] 2 IR 257. In that case the Respondent made an order under section 4 of the Tribunals of Inquiry (Evidence) Act 1921 directing the Plaintiffs, two journalists who had obtained and published confidential Tribunal information, to attend before the Tribunal on a specified date and produce thereat the material upon which the articles were based and answer questions as to the source of the material.

The Applicants obtained leave to apply for judicial review to have this order quashed. They argued that the section should not be given a broad construction; that what was involved was a compulsory power being used against a citizen and that the court should adopt a narrow and restrictive view of the scope of the section.

Rejecting this argument Blayney J. stated:-

"I do not think that there is any real doubt as to how the section should be construed. Its terms are very clear: "A Tribunal may make such orders as it considers necessary for the purposes of its functions."

He went on to hold that the section empowered the Respondent to make the order in dispute. Furthermore, he held that the rationale of the decision in The State (Lynch) v Cooney [1982] IR 337 applied to an opinion under section 4 namely that the opinion must be one which is bona fide held, factually sustainable and not unreasonable.

I am satisfied that I do have power under section 4 of the Tribunals of Inquiry (Evidence) Act 1979 to direct a person to attend for interview by Counsel to the Tribunal in appropriate circumstances and subject to the legal principles to which I have referred. In this context I think that it is important to draw attention to the distinction between requiring a person under compulsion to attend for interview and requiring them to answer particular questions. It is, of course, possible that a person who has been ordered to attend for interview may legitimately refuse to answer a particular question or questions which may be put to him, for example, on the basis of legal professional privilege. The obligation on a person to comply with an order to attend for interview is, of course, subject to any lawful entitlement that person may have not to answer particular questions.

I am engaged in the investigation of a number of matters which involve Michael Bailey, Thomas Bailey and Bovale Developments Ltd. I am of the opinion that it is necessary for the purposes of these investigations to require current personnel of Anglo Irish Bank Corporation Plc. to attend for interview by the Tribunal:-

- (a) William Barrett
- (b) Seán Fitzpatrick
- (c) Tom Browne
- (d) Pat Whelan

In forming this opinion, I have had regard to:

- (a) The Terms Of Reference of the Tribunal;
- (b) The information which the Tribunal has received from third parties, the substance of which has been disclosed to Michael Bailey, Thomas Bailey and Bovale Developments Ltd.
- (c) The correspondence exchanged between the Tribunal and Smith Foy & Partners and in particular letter of 23rd February 1999 from Smith Foy & Partners to the Tribunal.
- (d) Failure of Michael Bailey, Thomas Bailey and Bovale Developments Ltd. to voluntarily provide to the Tribunal the transcripts of the interviews conducted with personnel of Anglo Irish Bank Corporation Plc. in June 1988.

- (e) Limited information furnished by Michael Bailey and Bovale Developments Ltd. to the Tribunal.
- (f) The public interest of the Tribunal in discharging its mandate effectively.

Accordingly, I have decided to make orders in the terms of the schedule hereto requiring the attendance for interview of Mr. Fitzpatrick, Mr. Whelan, Mr. Browne and Mr. Barrett.

The Honourable Mr. Justice Feargus M. Flood
Sole Member of the Tribunal