IN THE MATTER OF THE TRIBUNAL OF INQUIRY INTO COMPLAINTS CONCERNING SOME GARDAÍ IN THE DONEGAL DIVISION

B E T W E E N

JOHN WHITE

Applicant

and

FRANK MCBREARTY SENIOR

Respondent

and

DAVID WALLEY

Notice Party

Ruling of the Sole Member of the Tribunal, Mr. Justice Frederick R. Morris, published on the 31st day of August, 2007

Introduction

On the 7th of July 2007, I commenced hearings in relation to the final module of the Tribunal's work. It is known as the Harassment/Garda Complaints module. It deals with Terms of Reference (c) and (j) of the Tribunal's Terms of Reference. This application is concerned solely with the harassment portion of the module. Term of Reference (c) provides that the Tribunal is to inquire urgently into the following definite matter of urgent public importance:

> **Allegations of harassment of the McBrearty family of Raphoe, County Donegal and of relatives, associates and agents of that family by members of the Garda Síochána subsequent to the death of Mr. Barron including the issue and prosecution of summonses relating to offences alleged to have occurred between 28th October, 1996 and 28th September, 1998.**

By Notice of Motion dated 25th of July 2007, Mr. John White (hereinafter referred to as "the applicant") applied for an order from the Tribunal directing that further and better discovery should be made of a number of classes of documents by Mr. Frank McBrearty Senior (hereinafter referred to as "the respondent"). When the Notice of Motion and grounding Affidavit had been served on Mr. McBrearty Senior, a letter was sent to the Tribunal on the 27th of July 2007 by Mr. David Walley, the principal in the firm of David Walley & Company solicitors, which firm acts for the respondent in a number of High Court actions. In that letter Mr. Walley indicated the instructions and submissions which his client, the respondent, wished to make in relation to the applicant's motion. On the 30th of July 2007 an affidavit was sworn by Ms. Helene

Byrne, who is a solicitor in Mr. Walley's firm, indicating that Mr. Walley would abide by whatever order might be made in relation to the production of documents by Mr. Walley.

The applicant's motion seeking further and better discovery was heard before me on the 31st of July 2007. The applicant was represented by solicitor and counsel. There was no appearance by either the respondent or the notice party. As well as hearing argument from counsel on behalf of the applicant, I also received submissions from Tribunal counsel which were made on behalf of Mr. McBrearty Senior in light of the direction given by Peart J. in the High Court action McBrearty v Morris[1] to the effect that all assistance should be given to parties appearing before the Tribunal without the assistance of solicitor and counsel.

Before coming to the substance of my ruling in relation to the various classes of documents sought by the applicant, it is necessary to indicate some of the more important developments which have occurred in relation to the hearing of this module prior to the time that the application was heard. This part of the module concerns an inquiry as to whether the extended McBrearty family, their associates or agents were harassed by members of An Garda Síochána in the relevant period. The case has been made by Mr. McBrearty Senior that his pub and nightclub premises were subjected to frequent and prolonged inspections. He claimed that this was an abuse of the liquor licensing laws by the Gardaí. He also complained that the Gardaí mounted vehicle checkpoints in close proximity to his nightclub. He maintained that all of this had a detrimental effect on his business. He stated that the campaign of harassment was furthered in a second step by the issuing of summonses in respect of alleged breaches of the liquor licensing laws and also in relation to alleged public order offences. He stated that the resulting prosecutions in the District Court were the further consequence of this campaign of harassment. In effect, he was maintaining the case that he was a reasonably law abiding publican, who was doing no more or no less than any other publican in Co. Donegal at the time and that the Gardaí were acting in a totally unfair and disproportionate way in the manner in which they enforced the law against him. In a contemporaneous note which was kept by his bar manager at the time and in the subsequent District Court prosecutions, the case was made on behalf of the licensee that the shutters on the bars inside the premises were closed at the appropriate time and were not reopened at any time subsequent to any Garda inspection on the premises. At the time of the inspections and indeed at the time of the District Court prosecutions, the Gardaí strongly contended that this was not the case. Having viewed what appeared to be freshly poured alcoholic drink on many occasions on which they inspected the premises after the legal closing hours, the Gardaí had a strong suspicion that while the shutters were closed when they arrived on the premises, the shutters had been open a short time previously. They also suspected that the shutters were reopened after their departure. In order to ascertain whether this was in fact happening, a covert operation was mounted on three consecutive weekends in April and May of 1997. The evidence of the Garda sergeant who carried out the surveillance on those occasions confirmed that the shutters on the bar were in fact being closed immediately prior to a Garda inspection of the premises and would be reopened immediately upon the departure of the Gardaí from the premises.

[1] Unreported, High Court, Peart J, 13th May 2003.

When the respondent and his bar manager came to give evidence before the Tribunal on this module, important concessions were made by them. They agreed that an elaborate CCTV system had been installed in the premises. One purpose for which it was used was to enable the owners of the premises to become aware when the Gardaí were approaching the main door of the nightclub premises. By means of an internal lighting system, the bar staff would then be alerted to the imminent arrival of the Gardaí. They would put down the shutters at that time. Thus, the shutters would be in a closed position when the Gardaí inspected the actual bar area. It was conceded that when the Gardaí left the premises, the shutters would reopen and they would continue serving alcoholic drink in breach of the law. It was conceded that this practice continued not only during the period when Sergeant John White was sergeant in Raphoe from January to August 1997, but also continued thereafter into 1998 and beyond. Mr. John Mitchell, the respondent's bar manager, also made the important concession that in his view there was no undue harassment of the premises by means of frequent or prolonged inspection of the premises by the Gardaí after August 1997. He also admitted that the evidence he had given on oath in the course of the District Court prosecutions had been untrue. These are most significant concessions. When considering whether further and better discovery should be directed, I must do so not in the light of the circumstances as they stood prior to the commencement of this module, but in the light of the circumstances as now appearing to be accepted as facts in this issue.

I will now turn to deal with each of the classes of documents in respect of which further and better discovery, or inspection, has been sought by the applicant:

(a) Copies of Garda Notebooks

The applicant has sought further and better discovery of copies of Garda notebooks which were furnished to Messrs. Binchys solicitors, who were the solicitors then acting for the respondent in the course of the District Court prosecutions which were heard in Donegal in 1998 to 2000. It was alleged that on foot of a discovery and disclosure order made by the Learned District Court Judge, copies of entries in Garda notebooks and, in particular, certain entries from notebooks owned by the applicant, were furnished to the solicitors acting on behalf of the respondent. In the letter furnished on behalf of the respondent, Mr. Walley stated that he has no memory of seeing any Garda notebooks in the files of Binchys solicitors. However, he states that if they are found on the files, the respondent has no objection to copies of these documents being furnished to the applicant. In these circumstances, I will made an order directing the respondent and Mr. Walley to swear a further affidavit of discovery in relation to any entries in Garda notebooks concerning the inspection of the nightclub premises, which they have in their possession.

(b) The originals of the handwritten notes made by the bar manager, Mr. John Mitchell

The applicant has also requested sight of the originals of the handwritten notes made by Mr. John Mitchell concerning Garda inspections of Mr. McBrearty's licensed premises. Copies of these handwritten notes have already been disclosed to the Tribunal and have been distributed as part of the book of evidence. The respondent has indicated that he has no objection to the original of these documents being

examined by the applicant's legal advisers. He has, however, refused to hand over the originals to the Tribunal on the basis that he requires same for a forthcoming High Court action. I regard this as a reasonable approach on the part of the respondent. It does not appear that there is any order required in respect of this class of documents. The originals of the notes can be inspected by the applicant's legal representatives at the offices of the notice party. The Tribunal will also avail of the opportunity to examine the original documents. Any costs incurred in relation to the inspection of the documents will be reserved for determination at the conclusion of this module.

(c) Documents, notes or memoranda concerning consultations had between the solicitor acting for Mr. McBrearty, and Mr. McBrearty and counsel, and witnesses, which were held during the hearing of the District Court prosecutions in Letterkenny District Court

It is this class of documents which has given rise to the most difficulty. I should begin by indicating how the existence of these documents came to the attention of the Tribunal. At an early stage in the Tribunal's work general orders seeking discovery of documents were issued by the Tribunal to all of the main parties appearing before it. The respondent in compliance with that order furnished a large amount of documentation by way of disclosure. The Tribunal staff had to read through the documentation and put it into categories. One of the documents which was furnished by the respondent at that stage was a detailed typewritten note which had been made by the solicitor who had then acted for the respondent in the course of the District Court prosecutions, Mr. Ken Smyth. These prosecutions were dealt with over a protracted period of time from 1998 until they were eventually withdrawn by the Director of Public Prosecutions in June 2000. While each prosecution was based on a separate set of summonses and were effectively independent prosecutions, they had at the application of the respondent been taken together. Furthermore, counsel acting for the respondent had made the case to the Learned District Court Judge that the prosecutions should not be adjudicated upon until what he termed the "wider issue" relating to allegations of general Garda harassment and misconduct towards his clients, was brought before the court. On this basis, the Learned District Court Judge agreed that he would hear each of the individual summonses but not reach a decision on any individual summons until he had heard what was termed the "wider issue" which was to be taken at the conclusion of the evidence in relation to the individual summonses. In the events which transpired, that evidence was never given, due to the fact that the summonses were withdrawn in June 2000.

Mr. Ken Smyth was a diligent and hardworking solicitor. He took detailed notes in respect of all the evidence and arguments advanced by both the prosecution and the defence before the District Court Judge on each of the occasions on which the matter was listed for hearing. This was a most comprehensive and extensive note running to some four hundred typed pages. This note has been of great assistance to the Tribunal. While not purporting to be anything like a complete transcript of what occurred in the District Court, I am satisfied that it represents an accurate and fair account of the evidence and arguments put before the Learned District Court Judge.

As is normal in all criminal prosecutions and civil actions, the clients had a consultation with their solicitor and counsel in advance of the hearing of evidence in

court. They also on many occasions had consultations during the breaks in the hearing of evidence and also at the end of the day when the court had concluded. Mr. Smyth had included notes of these consultations along with his record of what had occurred in the court that day. When giving evidence before the Tribunal he explained that his usual method of doing up his notes, was that he would take as comprehensive a handwritten note as he could both during the pre-trial consultation and during the giving of evidence. He would then retire to his car at lunchtime and dictate his notes onto a cassette. He would do the same thing again at the end of the day when the afternoon evidence had been given and when any post-trial consultation had been held. He would dictate that in his hotel bedroom in the evening. He said that when the tapes were completed he sent them to his secretary back at the office who would transcribe them into a typed format. It was in this way that both the note of the consultation that he had with counsel and his clients and the record that he had taken of the evidence in the District Court came to be included in the same very large document. When discovery was made of this document to the Tribunal those portions of the document dealing with the consultations held between the respondent, his witnesses and solicitor and counsel were blanked out and marked "privileged". The Tribunal had no difficulty in accepting that such consultations were indeed covered by legal professional privilege. The Tribunal did not seek to have the notes furnished in any unredacted form to it. It is these notes which the applicant now seeks production of by way of an application for further and better discovery. In the course of his argument before the Tribunal, counsel for the applicant put forward the case that while this portion of the documents may well have been covered by legal professional privilege, the right to claim such privilege had been lost due to the fact that the case fell within certain well defined exceptions to the circumstances in which this privilege can be claimed. I will deal with these aspects in due course. However, it is first necessary to deal with the question of jurisdiction.

Jurisdiction

I am satisfied that on the authority of Murphy v Flood[2] and Irish Haemophilia Society Limited v Lindsay[3] that I have jurisdiction to rule on the claim of privilege made in this case. I am also satisfied that if it were necessary to inspect the documents over which privilege has been claimed, I could make the necessary order and inspect the unredacted version of the documents in order to arrive at a decision. However, I am satisfied that it is not necessary to seek inspection of the unredacted version of the documents in this case. The existence of the privilege is not in dispute between the applicant and the respondent. The main dispute between them is whether the privilege can be defeated due to the existence of well recognised exceptions to the privilege known as legal professional privilege. In the Irish Haemophilia Society Limited case, Kelly, J. dealt with the question as to whether it was necessary for the Sole Member of the Lindsay Tribunal to inspect the documents in respect of which the claim of privilege had been made, in the following way:

> "In this case the respondent was, in my view correctly, satisfied as to the claim to legal professional privilege as set forth in a supplemental affidavit. In fact, the respondent had no doubt on the topic. What justification could there be for

[2] (1999) 3 I.R. 97.
[3] Unreported High Court, 16th May 2001.

> either an examination of the documents by the respondent or cross-examination of Dr. Lawlor in such circumstances? The answer is none."[4]

I am quite satisfied from viewing the document as a whole and on a consideration of the evidence given by Mr. Ken Smyth, that legal professional privilege has been correctly claimed in respect of the redacted portions of the document. I am satisfied that I have jurisdiction to deal with the applicant's application herein without the necessity to inspect the documents.

Legal Professional Privilege

Before turning to the arguments advanced in favour of production of the documents, it is necessary to say something about the background to the privilege known as legal professional privilege, which attaches to communications between a client and his lawyer. In Smurfit Paribas Bank Limited v A.A.B. Export Finance Limited[5] Finlay, C.J. adopted the following statement of the rationale behind the existence of this privilege as given by Jessel M.R. in Anderson v Bank of British Columbia (1876) 2 Ch.D 644:

> "The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman with whom he consults with a view to the prosecution of his claim, or the substantiating of his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation. That is the meaning of the rule."[6]

In Bula Limited v Crowley (No. 2)[7] Finlay, C.J. expanded on his reasoning given in the Smurfit Paribas Limited case in the following way at page 58 of the judgement:

> "In my judgement in Smurfit Paribas Limited v A.A.B. Export Finance Limited (1990) 1 I.R. 469, with which Walsh, J. agreed, I identified as a correct statement of the underlying principle of legal professional privilege the statement by Jessel, M.R. in Anderson v Bank of British Columbia (1876) 2Ch.D 644, wherein he makes it clear that a person entitled to and consulting a lawyer should be able to place unrestricted and unbounded confidence in the professional agent and that the communications he so makes should be kept secret unless with his consent it is disclosed. I further indicated that it had now become quite clear that such privilege extended not only to advice sought and obtained in the expectation of, or in the preparation for, actual or pending

[4] Ibid at page 6 of the Judgement.
[5] (1990) 1 I.R. 469.
[6] Ibid, page 476.
[7] (1994) 2 I.R. 54.

> litigation, but also extended, as was stated by Lawrence, J. in Minter v Priest (1929) 1 K.B.655, to such communications with a lawyer as pass as professional communications in a professional capacity. In the recent decision of Murphy v Kirwan (1994) I.L.R.M. 293 the history of the only exemptions from this privilege is traced and it is clear from the decisions therein referred to that for many years the only accepted exemption was where the communications were in furtherance of actual fraud. The grounds on which that exemption was identified are stated in Greenough v Gaskell (1883) 1 My.&K. 98 to be that such communications intended to further a criminal purpose could not possibly be otherwise than injurious to the interests of justice and to those of the administration of justice. As was indicated in the judgments in Murphy v Kirwan (1994) I.L.R.M. 293 having regard to the authorities considered, this concept of fraud or criminal conduct was to some extent expanded, but always to include conduct which contained an element of fraud or dishonesty and as I have said, moral turpitude."[8]

In the course of his judgement in Duncan v Governor Portlaoise Prison[9], Kelly, J. accepted a statement of the rationale behind this privilege as given by Lord Taylor of Gosforth, C.J. in R v Derby Magistrates Court, ex-parte B [1995] 3 WLR 681 at 695, as follows:

> "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 in which the administration of justice as a whole rests."[10]

In Miley v Flood[11] Kelly, J. again reiterated the important position which was held in our law by legal professional privilege:

> "Legal professional privilege is more than a mere rule of evidence. It is a fundamental condition on which the administration of justice as a whole rests. That is the conclusion which I reached in Duncan v Governor of Portlaoise Prison [1997] 1 I.R. 558."

In the course of the judgement, Kelly, J. went on to note that his decision in the Duncan case had been upheld on appeal to the Supreme Court in an *ex tempore* judgement delivered on the 5th of March 1997.

The issue of legal professional privilege was also touched upon in the context of civil litigation in the case of Martin & Doorley v Legal Aid Board and Others[12]. In that case Laffoy J. had to consider the provisions of S.32(2) of the Civil Legal Aid Act, 1995 which provided that notwithstanding the relationship of solicitor and client which

[8] Ibid page 58.
[9] (1997) 1 I.R. 558.
[10] Ibid page 575.
[11] (2001) 1 I.L.R.M. 489.
[12] [2007] 1 I.L.R.M. 481.

existed between a legal aid solicitor and his legally aided client, the solicitor shall if requested by a person authorised on their behalf by the Board, provide the authorised person with any information in such form as the person may specify relating to legal aid or advice provided to or by an applicant or person in receipt of legal aid or advice which is required by the Board for the purpose of enabling the Board to discharge its functions under the Act. The plaintiffs in that action were solicitors who were employed by the Legal Aid Board. They objected to producing their files to the person who had been authorised by the Board to inspect same, on the grounds that such files and the information contained therein was protected by legal professional privilege. The Learned High Court Judge held that the relevant sub-section mandated the solicitor of a legally aided client to furnish information to the Board which would, in general, be information in respect of which the solicitor owed a duty of confidentiality and was likely to be privileged and which a solicitor would not normally be permitted to disclose without the consent of his client. However, the Board's entitlement to request and the solicitor's obligation to provide this information was circumscribed by the requirement that it be required for the purpose of enabling the Board to discharge its functions under the Act. The court held that it must be assumed that the Oireachtas considered that confidential and privileged information would be required by the Board for this purpose. The Learned High Court Judge held that disclosure to an authorised person did not require the protection of legal professional privilege and it could not be regarded as a diminution of the protection afforded by that principle. This was due to the fact that an authorised person could not voluntarily divulge privileged information in a manner which would adversely impact on the client's interest, because any information received might only be used for the purpose of the performance of the Board's statutory functions. An authorised person could not be compelled to disclose the information at the suit of a third party and disclosure of privileged information would not result in the loss of the privilege. This case can be seen as somewhat turning on its own facts which were peculiar to the statutory framework governing the solicitor/client relationship in the civil legal aid context.

Having reviewed the rationale behind the privilege known as legal professional privilege and the status which it enjoys in our law at the current time, it is now appropriate to look at the substantive arguments put forward by Mr. Ó'Dúlacháin, S.C. on behalf of the applicant as to why the claim asserted by the respondent to legal professional privilege in respect of the redacted portions of the documents prepared by Mr. Smyth, should be defeated in this particular case. It was argued that there were a number of exceptions to the circumstances in which the claim to legal professional privilege would be upheld. He argued that there were a number of special circumstances existing in the present case which would justify defeating the claim to legal professional privilege made on behalf of the respondent. I will now deal with each of these grounds for exception in turn.

Waiver of Privilege

The first argument advanced on behalf of the applicant under this heading was that there had been an implied waiver by the respondent based on the fact that he had publicly called for the establishment of a Tribunal of Inquiry into a number of matters concerning his interaction with the Gardaí in Donegal. Counsel argued that having called for the establishment of the Tribunal and having been successful in that

endeavour, the respondent must be taken to have thereby waived all claims to legal professional privilege over any communications that he had with his solicitors in the relevant period. I do not accept that this proposition is well founded.

While no evidence was presented at the hearing of this application that Mr. McBrearty Senior had in fact called for the establishment of this Tribunal, I am prepared to take account of evidence given in an earlier module that the respondent had indeed called on a frequent basis for the establishment of a Tribunal of Inquiry into what he perceived were the shortcomings of the Gardaí in Donegal. However, I am of the view that the fact that he took that step cannot realistically be seen as any implied waiver of privilege over his communications with his lawyers. If this proposition were adopted it would lead to the somewhat absurd position whereby those who called for the establishment of Tribunals of Inquiry into certain matters, would be held to have abandoned all claims to legal professional privilege in respect of communications which they may have had with their lawyers, while other witnesses before the Tribunal, who had not called for the establishment of the Tribunal, could legitimately claim privilege over communications with their lawyers, merely because they had not participated in the call for the establishment of the Tribunal. This would be an absurd position to adopt.

The question of an implied waiver of the privilege is normally held to occur in the context of civil litigation where a client sues his former solicitor for negligence or breach of contract in respect of some previous occasion on which the solicitor acted for him. It has been held that in circumstances where the client sues his former solicitor or counsel, he thereby brings the relationship which he had with them into the public domain. In so doing, he cannot at the same time claim privilege and try to hide from the court aspects of that relationship. Furthermore, it has been held that where a solicitor is sued by a former client, he must be given the opportunity to properly defend himself in the action even if this requires divulging communications which would otherwise be covered by legal professional privilege; see McMullin v Carty[13], McMullin v Clancy[14]. There is no question in this case of the respondent making any allegations against his former solicitor in relation to his handling of the District Court prosecutions, such as would require the lifting of legal professional privilege in relation to their communications concerning those prosecutions. I do not accept that by merely calling for the establishment of a Tribunal of Inquiry into a large number of matters, that the respondent was thereby effectively laying bare all of the otherwise privileged communications which he had with his lawyers in the course of mounting a defence to the District Court prosecutions.

Counsel for the applicant also argued that there had been an express waiver of privilege by the respondent. He stated that this occurred in either of two ways. He argued that where a party to litigation or to an inquiry before a Tribunal had elected to put a document in evidence before the Tribunal, he could not cherry pick the portions of the document that he would allow into evidence while at the same time holding back other parts of the same document from scrutiny by the Tribunal or the court. As a broad statement of principle, I accept that that is correct. It would be unfair if a person who was mounting a claim against another person was entitled to put part of

[13] Unreported Supreme Court 29th January 1998.
[14] Unreported High Court 3rd November 1999.

a document into evidence but hold back other relevant parts of the document, or be entitled to put in part of a series of correspondence, while at the same time claiming privilege over other relevant parts of the same series of correspondence.

In this case the applicant maintains that there are two aspects of express waiver, each of which are sufficient to lead to the removal of the privilege enjoyed by the respondent in respect of his communications with his legal advisers. The applicant argues that the first express waiver occurred in respect of a memorandum which was drawn up by Mr. Smyth of a consultation held between 18.30 hours and 21.15 hours on the evening of the 9th of December 1998. This consultation occurred on one of the evenings during which the District Court prosecutions were proceeding against Mr. Frank McBrearty Senior and others for alleged breaches of the liquor licensing laws and also for alleged breaches of public order legislation. This document became entered in evidence in a somewhat curious way. It arose in the course of examination of Mr. Smyth in a previous module known as the Anonymous Allegations module. One of the issues which arose was as to the possible authorship of the first anonymous allegations document which was sent to a member of the Oireachtas and to Mr. Smyth and to Mr. Giblin, S.C. by Mr. Frank McBrearty Senior on the 25th of June 2000. It is not necessary to go into all of the details surrounding that document, suffice to say that in the course of the examination of Mr. Smyth, a question arose as to whether the document might have been drafted by a former police officer who was then helping the respondent in relation to matters generally. On day 586 of the Tribunal's hearings, Mr. Ken Smyth while being questioned by Tribunal counsel stated that it was his belief that the document had been drawn up by a former Garda. When asked as to the basis of the belief he said that this was due to the fact that on two occasions prior to June 2000, he had had a consultation with the respondent and this former Garda, wherein the former Garda had expressed views that were highly critical of Sergeant John White, one of the subjects of the allegations contained in the anonymous allegations correspondence. Mr. Smyth stated that he had a note of a consultation which was held on the evening of the 9th December 1998 wherein he had recorded this particular former Garda as having expressed strong views critical of Sergeant White. When he initially gave his evidence, Mr. Smyth only gave the gist of the content of that memorandum. Subsequently, the respondent waived his claim to legal professional privilege over that document and it was duly entered in the book of evidence for that module.

Counsel for the applicant has argued that because that document was a memorandum of a meeting held during the continuance of the District Court prosecutions and as the respondent had expressly waived his claim to privilege over it, he was thereby waiving his privilege to all the memoranda and attendances drawn up by Mr. Smyth in relation to the District Court prosecutions.

Having carefully reviewed that memorandum and the circumstances in which it came to be entered in evidence in the Anonymous Allegations module, I am satisfied that the applicant's argument on this ground is not well founded. I am satisfied that this particular memorandum was a separate attendance taken by Mr. Smyth of discussions that he had with Mr. McBrearty Senior at his home on the evening of the 9th of December 1998 with two former Gardaí. While the consultation occurred at a time when the District Court prosecutions were ongoing, this meeting was not really connected with those prosecutions. Although the attendance itself was headed

"Matter: District Court Summonses", there appears to have been only the most brief reference to the summonses themselves, when the question as to whether Garda John O'Dowd would be called as a witness was discussed briefly. The rest of the extensive note deals with a wider range of matters unconnected to the liquor licensing prosecutions then pending before the District Court. In these circumstances, I am satisfied that the waiver in respect of the claim of privilege over this document, does not require that the respondent should be deemed to have waived his claim to privilege over all the other memoranda and attendances taken during the time that the summonses were at hearing before the District Court.

The second area of alleged express waiver is in relation to the documents which were actually discovered by the respondent to the Tribunal. These appear in Volume 4 of the books of evidence for the Harassment module. The nature and extent of this documentation has already been described earlier in this ruling. I am satisfied that while the document appears in the book of evidence as one series of documents, this is merely accidental. They are in fact two quite distinct documents, being firstly an account of the evidence and arguments given in the course of the hearings before the District Court and secondly, a note or memorandum of consultations held between counsel, the solicitor, the client and the witnesses. As already noted these consultations are the usual type of consultations that are held before the beginning of a day's hearing and are held to review the evidence given at the end of the day. The respondent has always claimed legal professional privilege over these memoranda and attendances. I accept that the claim of privilege is something which he is entitled to raise in respect of these memoranda. I do not accept that by putting the portion of the document which concerned an account of what happened in court into evidence, he thereby expressly or impliedly waived his entitlement to claim privilege over those portions of the document which concerned the pre-trial and post-trial consultations and advice which he received from his solicitor and counsel. Accordingly, I hold that by making discovery of the document in the redacted form, he has not thereby expressly waived his claim to privilege over the other portions of the document dealing with these consultations with his solicitor and counsel.

The Fraud Exception

It has long been recognised that the claim to legal professional privilege can be defeated by what is known as the fraud exception. This was established in the case of R v Cox and Railton[15], when Stephen J. gave the following definition of the ground on which the claim to privilege could be defeated:

> "The reason on which the rule is said to rest cannot include the case of communications, criminal in themselves, or intended to further any criminal purpose, for the protection of such communications cannot possibly be otherwise than injurious to the interests of justice, and to those of the administration of justice. Nor do such communications fall within the terms of the rule. A communication in furtherance of a criminal purpose does not "come into the ordinary scope of professional employment"."[16]

[15] 14 QBD 153.
[16] Ibid page 167.

In Kuwait Airways Corporation v Iraqi Airways Company (No. 6)[17], Longmore, L.J. noted that whereas the judgement given by Glidewell, L.J. in R v Snaresbrook Crown Court [1988] QB 532, was overruled in relation to his interpretation of a particular statutory provision, his statement in relation to the fraud exception was expressly accepted by the Learned Judges in the House of Lords. In the Snaresbrook case Glidewell, L.J. had stated as follows:

> "Obviously, not infrequently persons allege that accidents have happened in ways other than the ways in which they in fact happen, or that they were on the correct side of the road when driving while actually they were on the wrong side of the road, and matters of that sort. Again, litigants in civil litigation may not be believed when their cases come to trial, but that is not to say that the statements that they had made to their solicitors pending the trial, much less the applications which they made if they applied for legal aid, are not subject to legal privilege. The principle to be derived from R v Cox and Railton applies in my view to circumstances which do not cover the ordinary run of cases, such as this is."

Longmore, L.J. went on to note that while the Snaresbook case was overruled by a later decision at the House of Lords, Lord Gough of Chieveley went out of his way to approve the first part of Glidewell, L.J's, reasoning:

> "I have to recognise that … my conclusion in the present case undermines part of the reasoning of Glidewell, L.J. in the Snaresbrook case. But it does not necessarily undermine the conclusion of the divisional court in that case. This is because I am inclined to agree with Glidewell, L.J. that the common law principle of legal professional privilege cannot be excluded by the exception established in R v Cox and Railton 14 QBD 153, in cases where a communication is made by a client to his legal adviser regarding the conduct of his case in criminal or civil proceedings, merely because such communication is untrue and would, if acted upon, lead to the commission of the crime of perjury in such proceedings."

Later, in the course of his judgement, Longmore, L.J. stated that if a client merely gives incorrect information or instructions to a solicitor, that of itself will not cause him to forfeit the privilege. It is only if there is a separate and freestanding fraud which does not necessarily have to involve the solicitor, that the privilege can be lost. The Lord Justice of Appeal put it in the following way:

> "Secondly, take a criminal purpose which only came into existence after litigation has begun. On the authority of the Snaresbrook case [1988] QB 532 and the Francis case [1989] AC 346, merely giving a solicitor an untrue statement about issues in the proceedings will not forfeit privilege. But a criminal conspiracy, particularly if it is separate from the actual issues in the proceedings albeit (inevitably) related to them, will be a self-standing criminal purpose outside the issues in the proceedings and privilege will not attach; that is shown by the Hallinan case [2005] I WLR 766."[18]

[17] (2005) 1 WLR 2734.
[18] [2005] 1 WLR 2746-2747.

In the course of his judgement in Murphy v Kirwan, [1993] 3 I.R. 501 Finlay, C.J. noted that the so-called fraud exception, which had been established in R v Cox and Railton, had been extended in subsequent cases. It had been extended to a case where a claim was made that a charge entered into by a company was entered into when the company was insolvent and that it was not given in the ordinary course of business, but to defeat and to delay the holders of floating debentures; Williams v Quebrada Railway, Land and Copper Company Limited [1895] 2 Ch.751. It had also been applied to a case where there was a conspiracy by former employees breaching their duty of fidelity and confidence to a company; Gamlen Chemical Company (UK) Limited v Rochem Limited and Others [1983] R.P.C. 1. However, in Crescent Farm Sports Limited v Sterling Offices Limited [1972] Ch. 553, the Learned Trial Judge had refused to apply the exemption from professional privilege to a claim for interference with the contract and conspiracy. Finlay, C.J. summed up the position in the following way:

> "I am satisfied that these extensions of the application of the exemption flow logically and consistently from the principle laid down in R v Cox and Railton (1884) 14 QBD 153 as the real reason for the introduction of the exemption in the first place, and that the essence of the matter is that professional privilege cannot and must not be applied so as to be injurious to the interests of justice and to those in the administration of justice where persons have been guilty of conduct of moral turpitude or of dishonest conduct, even though it may not be fraud."

In Bula Limited v Crowley (No. 2) [1994] 2 I.R. 54, the Supreme Court held that the exemption from the doctrine of legal professional privilege was restricted to cases where allegations of fraud, criminal conduct or conduct constituting a direct interference with the administration of justice, all of which allegations contained a clear element of moral turpitude, were made against the defendant.

On behalf of the applicant, Mr. Ó'Dúlacháin, S.C. argued that due to the evidence already given by the respondent and by Mr. Mitchell, in conjunction with the admissions made in relation to the content of the so-called "Mitchell diary", and having regard to the affidavits already sworn by Mr. McBrearty in the course of his High Court civil proceedings denying any breach of the liquor licensing laws, and in particular in relation to the concession made by Mr. Mitchell in relation to the evidence that he gave in the course of the District Court prosecutions, that this raised a prima facie inference of a conspiracy by Mr. McBrearty, Mr. Mitchell and others to commit perjury in an attempt to pervert the course of justice. Mr. Smyth's evidence to the effect that he had not known that any illegal trading had gone on and therefore did not know that his instructions at the time were incorrect, has not been challenged. Counsel for Mr. White stated that he was not making the case that Mr. Smyth was part of any conspiracy, but rather that the respondent, Mr. Mitchell and others had entered into a conspiracy to give false instructions to the solicitor, which was followed by the giving of perjured evidence to the District Court. He argued that in these circumstances the fraud exemption had come into play so that the respondent could no longer claim privilege over the relevant communications with his solicitor and counsel.

I can see the force in this argument. However, I have to bear in mind that what is being sought are notes of a consultation held between an accused person and his solicitor and counsel in the course of ongoing criminal trials. The law recognises the fundamental right which an accused person has to consult freely with his solicitor even before he has been charged with any criminal offence. The right of access to a lawyer has been recognised in a number of ways; when arrested, a person has the right to consult a solicitor and must be informed of this right. He has to be allowed reasonable access to his solicitor during the period of his detention. The regulations providing for the treatment of persons in custody in Garda stations provide that such consultations between an arrested person and his solicitor, can take place within the sight but not the hearing of members of An Garda Síochána. If a person is subsequently charged and brought before a court, he has the right to be represented by a lawyer of his choice at his trial. If he cannot afford to provide for a lawyer out of his own means the State is obliged to provide one for him; State (Healy) v Donoghue[19].

No Irish case has been cited to me where communications between an accused person and his legal advisers in the course of criminal proceedings have been taken out of the protection of legal professional privilege. The cases reviewed above all arose in the course of civil litigation.

In other jurisdictions there are conflicting authorities as to whether such attendances can ever be deprived of legal professional privilege. Questions in relation to the production of such documents have largely arisen where it has been argued that another accused person needs sight of the documentation to establish his innocence in respect of the matter on which he has been charged. In R v Barton[20], Caulfield, J. ruled in favour of the production of the documents and said at page 118 of his judgement:

> "I think the correct principle is this, and I think it must be restricted to these particular facts in a criminal trial, and the principle I am going to enunciate is not supported by any authority that has been cited to me, and I am just working on what I conceive to be the rules of natural justice. If there are documents in the possession or control of a solicitor which, on production, help to further the defence of an accused man, then in my judgement no privilege attaches. I cannot conceive that our law would permit a solicitor or other person to screen from a jury information which, if disclosed to the jury, would perhaps enable a man either to establish his innocence or to resist an allegation made by the Crown. I think that is the principle that should be followed."

In R v Ataou,[21]an appeal was allowed in respect of a conviction which had been obtained when in the course of the trial the defendant had sought to adduce in evidence the communications which had taken place between an accused and his former solicitor, which application had been refused. On this basis, the Court of Appeal held that the conviction was unsafe.

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[19] [1976] I.R. 325.
[20] [1973] 1 WLR 115.
[21] [1988] 1 QB 798.

Both R v Barton and R v Ataou were overruled by the House of Lords in R v Derby Magistrates Court, ex parte B. In the course of his judgement Lord Taylor of Gosforth, C.J. stated at p.696:

> "But it is not for the sake of the applicant alone that the privilege must be upheld. It is in the wider interests of all those hereafter who might otherwise be deterred from telling the whole truth to their solicitors. For this reason I am of opinion that no exception should be allowed to the absolute nature of legal professional privilege, once established. It follows that R v Barton [1973] 1 WLR 115 and R v Ataou [1988] QB 798 were wrongly decided, and ought to be overruled."

The Ontario Court of Appeal took a somewhat different approach in R v Dunbar and Logan[22] in which the court accepted the reasoning in R v Barton. In the course of his judgement Martin, J.A. stated as follows at p.32 of his judgement:

> "No rule of policy requires the continued existence of the privilege in criminal cases when a person claiming the privilege no longer has any interest to protect and when maintaining the privilege might screen from the jury information which would assist an accused."

In Smith v Jones[23] the Supreme Court of Canada had to consider whether a further exception should be made to legal professional privilege where disclosure was required on the basis of public safety. In that case a psychiatrist who had been employed by the lawyers acting for a convicted prisoner to carry out an examination of the prisoner and to give evidence as to whether or not he was likely to re-offend, came to the conclusion that the prisoner was likely to re-offend. When his report was submitted, he learnt from the lawyers that it was not to be presented to the court. The psychiatrist brought an application before the court seeking permission to make his report known to the prosecution and to the police. The court held that public safety was a justifiable exception to legal professional privilege and relieved the psychiatrist from the obligation of confidentiality. The relevant portion of the head note reads at p.2 of the report:

> "Both parties made their submissions on the basis that the psychiatrist's report was protected by solicitor/client privilege, and it should be considered on that basis. The solicitor/client privilege is a principle of fundamental importance to the administration of justice. It is the highest privilege recognised by the courts. However, despite its importance, the privilege is not absolute and remains subject to limited exceptions, including the public safety exception. While only a compelling public interest can justify setting aside solicitor/client privilege, danger to public safety can, in appropriate circumstances provide such a justification."

In considering this ground of argument advanced on behalf of the applicant, I also have to consider the protections afforded to solicitor/client communications by the European Convention on Human Rights. Section 2 of the European Convention on

[22] 138 D.L.R. 221.
[23] [1999] 1 S.C.R. 455.

Human Rights Act, 2003 provides that when interpreting and applying any statutory provision or rule of law, a court shall, insofar as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the convention provisions. The convention provides that communications between a client and his lawyer shall be private. The privacy of these communications is respected even where a person has been convicted of a criminal offence and continues to communicate with a lawyer; see Campbell v U.K.[24]

In that case, the court considered the issue of privilege in the context of both Article 6 (i.e. right to a fair trial) and Article 8 (i.e. right to privacy) of the European Convention. The court held that:

> "46. It is clearly in the general interest that any person who wishes to consult a lawyer should be free to do so under conditions which favour full and uninhibited discussion. It is for this reason that the lawyer-client relationship is, in principle, privileged. Indeed, in its S. v. Switzerland judgment of 28 November 1991 the Court stressed the importance of a prisoner's right to communicate with counsel out of earshot of the prison authorities. It was considered, in the context of Article 6, that if a lawyer were unable to confer with his client without such surveillance and receive confidential instructions from him his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective….
>
> 47. In the Court's view, similar considerations apply to a prisoner's correspondence with a lawyer concerning contemplated or pending proceedings where the need for confidentiality is equally pressing, particularly where such correspondence relates, as in the present case, to claims and complaints against the prison authorities….
>
> 48. Admittedly…the borderline between mail concerning contemplated litigation and that of a general nature is especially difficult to draw and correspondence with a lawyer may concern matters which have little or nothing to do with litigation. Nevertheless, the Court sees no reason to distinguish between the different categories of correspondence with lawyers, which, whatever their purpose, concern matters of a private and confidential character. In principle, such letters are privileged under Article 8."[25]

On the basis of the absence of Irish authority on this aspect and in light of the conflicting authorities from other jurisdictions, I must do the best that I can from first principles, having regard to the general statements of principle outlined earlier in this ruling and to the constitutional and statutory framework in this jurisdiction. I would accept that in very limited circumstances it may be appropriate to force a person to reveal the communications had between them and their solicitors in the course of criminal proceedings. I would venture to state that it would only be in the most rare of cases that the interests requiring the lifting of the privilege would outweigh the interest in maintaining the privilege in respect of communications passing between a client and his lawyers prior to and in the course of criminal proceedings.

[24] (1993) 15 EHRR 137.
[25] (1992) 15 E.H.R.R. 137 at 160-161.

In the circumstances of this application, I am not prepared to hold that any interests of the applicant are sufficient to require that the respondent should be disentitled to maintain his claim of privilege over his consultations with his lawyers in the course of the District Court prosecutions. In reaching this conclusion, I have had regard to the significant concessions already obtained from the respondent and from Mr. Mitchell in the course of their evidence before the Tribunal. In these circumstances, and while acknowledging that the taking of evidence is not yet completed, it would appear difficult for anyone to argue that the prosecutions in the District Court were maliciously brought, or were based on a false case put forward by any of the Garda witnesses. In fact, the very opposite has already been admitted to have been the case. In these circumstances, it appears to me that there is no justification in requiring the respondent to abandon his claim to legal professional privilege over those portions of the documents. In respect of the fraud exception, I am satisfied on the basis of the authorities already cited, that what is required is not merely a case where a client or an accused gives untrue or misleading instructions to his solicitor, but there must be a freestanding fraud independent of the instructions for the trial itself together with the existence of moral turpitude before the privilege will be removed. If it were the case that wherever a client gave misleading instructions to his instructing solicitor, in advance of a trial or a civil action and that this thereby rendered such communications exempt from legal professional privilege, it seems to me that the privilege would become almost useless. Given the fundamental nature of the privilege, this cannot be the case. Accordingly, I hold that in the circumstances of this case the application does not fall within the fraud exception.

The Innocence at Stake Exception

As already noted in the authorities cited above, it has been recognised in some jurisdictions that the privilege against production of documents covered by legal professional privilege can be overcome by the innocence at stake exception. The cases outlined in the previous section of this ruling are examples of where the innocence at stake exception was considered and in some cases applied. Counsel for Mr. White cited passages from the judgements given in Howlin v Morris[26] as authority for the proposition that the innocence at stake exception is not confined to a criminal trial. I do not accept that the dicta cited support the argument advanced by counsel on behalf of the applicant. The innocence at stake exception was raised in argument before the High Court and the Supreme Court in that case not on behalf of the senior officers against whom allegations had been made in the anonymous allegations document, but was raised by counsel on behalf of the respondent in those proceedings, who argued that the privilege asserted by the two members of the Oireachtas, had to yield to the innocence at stake exception on behalf of persons who may have been convicted and sent to jail on the basis of allegedly false evidence according to the allegations contained in the document. On a correct interpretation of the dicta in the judgements given in Howlin v Morris, the court was indicating that it was not only those who are undergoing a criminal trial who could invoke the innocence at stake exception, but also those who may have been wrongly convicted on the basis of evidence which was alleged to have been false.

[26] (2006) 2I.R. 321.

The applicant is not facing any criminal charges arising out of the District Court proceedings in Letterkenny. In the circumstances, I cannot see any basis on which he can establish that he is entitled to rely on the innocence at stake exception sufficient to remove the privilege attaching to those documents.

Accordingly, for the reasons stated, I refuse the application to order production of the memoranda drawn up by Mr. Ken Smyth concerning consultations held between the respondent, his witnesses and his legal advisers in advance of or during the continuance of the District Court prosecutions.

(d) Originals, copies of originals and typed notes made by Mr. John Mitchell in relation to inspections of the McBrearty premises which have not been previously discovered

The applicant is of the view that the discovery which has already been made of the so-called "Mitchell diary" is not complete. He is of opinion that there may be further elements of that diary which have not been produced to the Tribunal. The respondent has stated in the letter received from his solicitor that they believe that all copies of the original notes drawn up by Mr. Mitchell have been discovered to the Tribunal. There does not appear to be any objection to the production of any further notes if such exist. Accordingly, I will make the necessary order in this regard.

(e) All documents touching or concerning any alleged downturn in patronage or downturn in trade in Mr. McBrearty's licensed premises in the years 1997 and 1998

Counsel for the applicant argued that because the respondent had made the case that the applicant had indicated to him that he was going to set out to destroy the respondent's business and because the respondent had further alleged that his business had in fact been adversely affected as a result of the activities of the Gardaí and in particular the activities of the applicant, that therefore the applicant was entitled to have sight of all relevant financial records and other records which would show whether or not there was a fall off in the number of persons attending the respondent's premises and whether there was any fall off in his profits due to any alleged action on the part of the Gardaí. His counsel argued that it was necessary for the applicant to have sight of this documentation so as to carry out an effective cross-examination of the respondent.

I do not accept that this argument is well founded. The essential issue in the harassment module is whether any members of the Gardaí harassed Mr. McBrearty and his family. This involves an examination of all the interaction between the extended McBrearty family, its associates and agents with the Gardaí during the relevant period. Whether or not any such harassment (if found to exist) actually had any affect on the turnover of Mr. McBrearty's nightclub premises is quite irrelevant. One could have harassment of a premises without any downturn in trade. Equally, one could have no harassment but a premises might still suffer a downturn in trade due to totally unrelated factors.

If the Tribunal were to go down this route it would have to obtain figures both for the period prior to the alleged harassment and for the period in question. One would

then have to analyse the figures in great detail. One could look at the numbers attending the premises. Indeed there are already figures in the book of evidence which appear to give the relevant figures in this regard. However, such a simple analysis would not determine the issue because it could be argued that the increased numbers or the maintenance of numbers attending the premises, was due to marketing strategies employed by the owner of the premises such as a reduction in the entrance price to the premises or a reduction in the price of alcohol served on the premises. If one then looked at the profit and loss accounts for the relevant period, that too could be unrepresentative of the numbers actually attending at the premises if the prices had been reduced during the relevant period.

Even if a falloff in trade were identified, the question of causation would then arise. It might be argued that such falloff as was proven in evidence, was caused by Garda harassment of the premises. However, one could equally be faced with the argument that such downturn in business was caused by a marketing strategy employed by a rival nightclub in the vicinity, or was caused by the opening of a new nightclub in a nearby town.

I am satisfied that the question as to whether there was any downturn in the respondent's business and, if so, the cause of such downturn, is an entirely collateral issue. It is of no relevance to the matter into which I must inquire urgently in the course of this module. The Tribunal would not be justified in spending an inordinate amount of time investigating whether there was a downturn in the respondent's business. Such an inquiry would not help the Tribunal in its primary goal in ascertaining whether there was harassment of members of the McBrearty family by members of An Garda Síochána. There is a limit to the number of issues which can be looked at as being relevant to the central issue in this case. The issue as to whether Mr. McBrearty's business did or did not suffer a downturn is an entirely collateral issue and accordingly the answers given by Mr. McBrearty on that aspect will have to be seen as final, (see observations of Rolfe, B. in Attorney General v Hitchcock).[27] In the circumstances, I refuse to order discovery of the documents sought under this heading of the Notice of Motion.

(f) <u>Documents concerning the compromise of interlocutory proceedings taken by the respondent in July 1997</u>

The case has been made by the respondent that the withdrawal of his application for injunctive interlocutory relief in July 1997 was part and parcel of an agreement that there would be no further Garda harassment of his premises. As yet, no evidence of any formal agreement to this effect has been forthcoming. However, I am conscious that the respondent has not concluded giving his evidence to the Tribunal. For his part, the applicant maintains that there was no such agreement.

The existence of any agreement or understanding leading to the settlement of the interlocutory aspects of the civil action in July 1997, would be relevant to the Tribunal's inquiry. I will direct that discovery be made by the respondent and by the notice party of any document, note or memorandum, or any part thereof, evidencing

[27] (1847) 1Exch.91.

the terms of any concluded settlement agreement leading to the withdrawal of Mr. McBrearty Senior's application for an injunction in July 1997.

That concludes my ruling on this application. The question of the costs of and incidental to this application will be ruled upon at the conclusion of this module.

Signed:

_____
The Hon. Mr. Justice Frederick R. Morris
Sole Member of the Tribunal

Date: _____