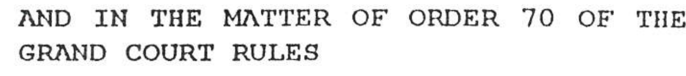
IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 305 OF 1997



IN THE MATTER OF THE EVIDENCE (PROCEEDINGS IN OTHER JURISDICTIONS) (CAYMAN ISLANDS) ORDER 1978

AND IN THE MATTER OF ORDER 70 OF THE GRAND COURT RULES

AND IN THE MATTER OF PROCEEDINGS BEFORE A TRIBUNAL OF INQUIRY (DUNNES PAYMENTS) appointed by instrument of AN TAOISEACH of IRELAND

Antonio Bueno, Q.C. and Charles Quin for applicant

Ramon Alberga, Q.C. and Darryl Myers for witness John A. Furze

(Other witnesses not present and not represented)

IN CHAMBERS: 22nd, 23rd and 27th May, 1997

BEFORE: PATTERSON, J. (Ag.)

Decision of the Court

This is an ex parte application with notice for an order for evidence to be obtained in the Cayman Islands for the purpose of giving effect to a request from a Tribunal of Inquiry (Dunnes Payments) appointed by instrument of An Taoiseach of Ireland on the 7th February, 1997 ("the tribunal"). The request is directed to the Grand Court, Cayman Islands, British West

Indies, and is under the hand of "The Honourable Mr. Justice Brian McCracken, Judge of the High Court of Ireland and Sole Member of the above-mentioned Tribunal" on the 12th day of May, 1997. The request is authorised by the tribunal's order made on the said 12th day of May, 1997, and it seeks the assistance of the Grand Court in obtaining evidence from a number of witnesses, named therein, including John A. Furze, who is the only one opposing the application ("the opposer"). I understand that each of the other witnesses mentioned in the letter of request was served with notice of this application, and that they are all represented by the law firm of Maples and Calder. Mr. Bueno, Q.C. states that the tribunal will abide by the final result of this application as opposed by the witness Furze alone and that whatever order is made, all parties will consider themselves bound by it.

Background

On the 6th day of February, 1997, the Dáil Eireann and the Seanad Eireann (the lower and upper Houses of Parliament of the Republic of Ireland), resolved to set up a Tribunal of Inquiry in the following terms:

> "Bearing in mind serious public concern about alleged payments made and benefits conferred by, or on behalf of, Dunnes Holding Company, other associated companies or entities and/or Mr. Ben Dunne and/or companies or trusts controlled directly or indirectly by members of the Dunne Family between 1 January, 1986 and 31 December, 1996, to persons who were members of the Houses of the Oireachtas during that period or relatives or connected persons as defined in the Ethics in Public Office Act, 1995, to political

"parties, or to other public representatives or other public servants.

And noting the Interim Report of the Independent Person appointed pursuant to an Agreement dated the 9th day of December, 1996, made between the Government and Dunnes Holding Company,

Resolves that it is expedient that a Tribunal be established, under the Tribunals of Inquiry (Evidence) Act, 1921, as adapted by or under subsequent enactments, and the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979, to enquire urgently into, and report to the Clerk of the Dáil and make such findings and recommendations as it sees fit, in relation to the following definite matters of urgent public importance:

(a) All payments in cash or in kind directly or indirectly whether authorised or unauthorised within or without the State which were made to or received by

(i) persons who were between 1 January, 1986 and 31 December, 1996, members of the Houses of the Oireachtas,

(ii) their relatives or connected persons as defined in the Ethics in Public Office Act, 1995,

(iii) political parties,

from Dunnes Holding Company and/or any associated enterprises as defined in the Schedule hereto and/or Mr. Ben Dunne or any person on his behalf or any companies, trusts or other entities controlled directly or indirectly by Mr. Ben Dunne between 1 January, 1986 and 31 December, 1996, and the considerations, motives and circumstances therefor;

(b) Such further matters as Dáil Eireann and Seanad Eireann might by further Resolution consider

> "appropriate to refer to the Tribunal because they require further investigation, relating to other payments made to 'Relevant Persons or Entities' within the meaning of the Agreement dated the 9th day of December, 1996, made between the Government and Dunnes Holding Company, following receipt by the Ceann Comhairle and the Cathaoirleach of Seanad Eireann of any further report from the Independent Person appointed pursuant to the said Agreement whereupon such report shall be laid before both Houses of the Oireachtas immediately on its receipt."

The schedule follows in which "associated enterprises", as used in the text of the resolutions, is defined, but that is not germane to the outcome of this application, and I need not set it out.

In pursuance of those resolutions and in exercise of the powers conferred on An Taoiseach by section 1 (as adapted by or under subsequent enactment) of the Tribunals of Inquiry (Evidence) Act, 1921, the following Order was made:

> "1. This Order may be cited as the Tribunals of Inquiry (Evidence) Acts, 1921 and 1979, Order, 1997.
>
> 2. A Tribunal is hereby appointed to enquire urgently into and report and make such findings and recommendations as it sees fit to the Clerk of the Dáil on the definite matters of urgent public importance set out at Paragraphs (a) and (b) of the Resolutions passed by Dáil Eireann and Seanad Eireann on the 6th day of February, 1997.
>
> 3. The Honourable Mr. Justice Brian McCracken, a Judge of the High Court, is hereby nominated to be the sole member of the Tribunal.
>
> 4. The Tribunals of Inquiry (Evidence) Act, 1921 (as adapted by or under

"subsequent enactments) and the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979, shall apply to the Tribunal.

GIVEN under my Official Seal, this 7th day of February, 1997.

TAOISEACH"

It is important to note that the Order has three distinct functions. Firstly, it is this Order that appoints the tribunal, thus giving effect to the resolutions of the Houses of Parliament. Secondly, it nominates the sole member of the tribunal. Thirdly, and most importantly, it provides that "The Tribunal of Inquiry (Evidence) Act, 1921 (as adapted by or under subsequent enactments) and the Tribunals of Inquiry (Evidence)(Amendment) Act, 1979, shall apply to the Tribunal" ("the 1921 Act").

The 1921 Act "make provision with respect to the taking of evidence before and the procedure and powers of certain Tribunals of Inquiry." The 1921 Act (with its adaptations and amendments) is in force in Ireland today, and Mr. Bueno, Q.C. has relied on it to a very large extent in putting forth his arguments in support of the application.

It is interesting to trace the history of the legislation relevant to this application, and in particular the 1921 Act, and I can do no better than to adopt and quote the evidence contained in the affidavit in support of the application, sworn by Gerald William Hogan, Barrister-at-law on the 16th May, 1997. This is how he puts it:

"(1) After the passing by both the Parliament of Great Britain and the Parliament of Ireland of the Act of Union 1800, the then Kingdoms of Great Britain

"and the Kingdom of Ireland were united into one Kingdom under the name of the Kingdom of Great Britain and Ireland. By the Third Article of the Act of Union it was enacted that such United Kingdom 'be represented in one and same Parliament to be styled the Parliament of the United Kingdom of Great Britain and Ireland'.

(2) Following the Act of Union (which came into force in 1801) until the establishment of the Irish Free State on December 6th, 1922, the Parliament of the United Kingdom was the sole legislature for the entirety of Ireland. During this period, all legislation enacted by the Parliament of the United Kingdom applied to Ireland, save where this was expressly excluded by the terms of the legislation itself. The 1921 Act not only contains no such express exclusion for Ireland, but from its terms it was clearly intended to apply to Ireland. There is, in my opinion, no question but that the 1921 Act applied to Ireland as much as to anywhere else in the United Kingdom.

(3) The 1921 Act received the Royal Assent and came into force on 24th March 1921.

(4) In December 1921, the Government of the United Kingdom reached an accommodation with the representatives of the Irish people whereby as a result of that Treaty, the then British Government and the (Irish) Provisional Government took steps to establish the Irish Free State. Legislative effect was given to that Treaty by the Irish Free State (Agreement) Act 1922 by the British Parliament and this Act received Royal Assent on March 31, 1922.

(5) The ratification in Ireland was more complex. The Treaty was approved by Dáil Eireann on January 7, 1922 (but which was at that stage regarded by the British as an illegal assembly) and by the House of Commons of Southern Ireland on January 14, 1922 (as was required by Article 18 of the Treaty). The House of Commons for Southern Ireland had been created by the Government of Ireland Act 1920 and had been vested with certain legislative

"powers. In fact, this body met only once (namely to approve the Treaty) and was later dissolved by proclamation of the Lord Lieutenant on May 27, 1922. It never exercised any of its legislative powers.

(6) Following elections held in June 1922, Dáil Eireann (the Irish Parliament) sitting as a constituent assembly passed the Constitution of the Irish Free State (Saorstát Eireann) Act 1922. Parallel legislation was enacted by the British Parliament to give effect to these changes: Irish Free State Constitution Act 1922 (13 Geo. V, c.2).

(7) Article 73 of this Constitution provided that:

> 'subject to this Constitution and to the extent that they are not inconsistent therewith the laws in force in the Irish Free State (Saorstát Eireann) at the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas.'

(8) The passing and adoption of the Constitution by Dáil Eireann sitting as a constituent assembly and by the British Parliament was announced on the 6th December 1922 by proclamation of His Late Britannic Majesty King George V. In accordance with Article 83 of the said Constitution, the Constitution itself came into force on that day.

(9) The 1921 Act was in force on the said date and was, therefore, continued in full force and effect by virtue of Article 73 of the said Constitution.

(10) In 1937, in a plebiscite held under the provisions of the Plebiscite (Draft Constitution) Act 1937, the people of the then Irish Free State (Saorstát Eireann) approved a new Constitution which had been approved by Dáil Eireann. The said Constitution was approved by vote of the people on July 1st 1937 and by virtue of Article 62.i thereof came into operation

"on the 27th day of December 1937. The Irish Free State ceased to exist on the coming into force of the new Constitution.

(11) The Constitution of 1937 is and remains the fundamental law of Ireland. Article 50 thereof provides that:

> 'subject to this Constitution and to the extent that they are not inconsistent therewith, the laws in force in Saorstát Eireann immediately prior to the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas.'

The 1921 Act was in force immediately prior to the 27th day of December 1937 and, accordingly, continued to be of full force and effect after the coming into force of the said Constitution of 1937.

(12) The 1921 Act is not and has not been inconsistent with either the Constitution of 1922 or the Constitution of 1937 and has not been repealed. The 1979 Act, which amended the 1921 Act in respects which are not material, clearly reflects this. The 1921 Act (as amended) therefore continued, and continues, in full force and effect."

The Powers of the Tribunal

Undoubtedly, the tribunal has been appointed in accordance with the laws of Ireland. Its mandate is to inquire into a definite matter described as of urgent public importance, the details of which I have already stated. The Order appointing the tribunal clearly stipulates that the 1921 Act shall apply. For the purposes of this application, section 1(1) of the 1921 Act is material. And it reads as follows:

> "1.--(1) Where it has been resolved (whether before or after the commencement of this Act) by both Houses of Parliament

> "that it 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;
>
> and a summons signed by one or more of the members of the tribunal may be substituted for and shall be equivalent to any formal process capable of being issued in any action for enforcing the attendance of witnesses and compelling the production of documents.

Section 4 of The Tribunals of Inquiry (Evidence)(Amendment) Act 1979 is of some relevance also. It reads as follows:

> "4. 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."

What then are the powers of the tribunal under the provisions of the 1921 Act with respect to its function of

taking evidence? The tribunal has power to issue subpoenae for witnesses to attend and give evidence and to produce documents. On attendance, the tribunal has the power to examine them on oath, affirmation or otherwise (section 1(1)(a) & (b)). But unlike the powers vested in the High Court or a judge thereof, the tribunal has no statutory or inherent power to punish anyone who disobeys its subpoena or other process lawfully issued. The power to punish any such person rests in the High Court and the only power that the tribunal has in that regard is that it may bring the matter to the attention of the High Court. Section 1(2) of the Act provides as follows:

> "(2). If any person--
>
> > (a) on being duly summoned as a witness before a tribunal makes default in attending; or
> >
> > (b) being in attendance as a witness refuses to take an oath legally required by the tribunal to be taken, or to produce any document in his power or control legally required by the tribunal to be produced by him, or to answer any question to which the tribunal may legally require an answer; or
> >
> > (c) does any other thing which would, if the tribunal had been a court of law having power to commit for contempt, have been contempt of that court;
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> the chairman of the tribunal may certify the offence of that person under his hand to the High Court, or in Scotland the Court of Session, and the court may thereupon inquire into the alleged offence and after hearing any witnesses who may be produced against or on behalf of the person charged with the offence, and after hearing any statement that may be offered in defence, punish or take steps for the punishment of that person in like manner

> "as if he had been guilty of contempt of the court."

The power that is most material to this application, however, is that set out at section 1(1)(c):

> "(c) Subject to rules of court, the issuing of a commission or request to examine witnesses abroad."

It is in the exercise of this power that the tribunal ordered, on the 12th May, 1997, that "a letter of request do issue addressed to the Grand Court, Cayman Islands, British West Indies, to make such provision as shall appear to that Court to be fit and proper for the purpose of examining under oath" certain specified persons, and for the production of documents by them. On the said day the letter of request was duly issued and the ex parte application with notice supported by affidavit, filed in the Grand Court.

The Jurisdiction of the Grand Court

The jurisdiction of the Grand Court to consider a request from a foreign court or tribunal and to make an order for persons within the jurisdiction to assist the foreign court or tribunal by giving oral or documentary evidence for proceedings before such a foreign court is statutory. The relevant legislations are: Firstly, The Evidence (Proceedings in Other Jurisdictions)(Cayman Islands) Order, 1978 which, by section 3, extends to the Cayman Islands the provisions of "Sections 1 to 3 and 5 to 10 of, and Schedule 2 to, the Evidence (Proceedings in Other Jurisdictions) Act 1975 (UK), with the exceptions, adaptations and modifications specified in the Schedule" to the

said Order ("the 1978 Order"). Secondly, Order 70 of the Grand Court Rules 1995, which is mainly procedural.

The 1978 Order came into operation on the 10th January, 1979, and together with Order 70 of the Grand Court Rules, 1995, they now provide the law and procedure in connection with the obtaining of evidence in the Cayman Islands for use in proceedings in a foreign court. For the purposes of this application, the material legislation is set out in section 1 of the Schedule to the 1978 Order, which reads:

> "1. Where an application is made to the Grand Court for an order for evidence to be obtained in the Cayman Islands, and the court is satisfied --
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> (a) that the application is made in pursuance of a request issued by or on behalf of a court or tribunal ("the requesting court") exercising jurisdiction in a country or territory outside the Cayman Islands; and
>
> (b) that the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated,
>
> the Grand Court shall have the powers conferred on it by the following provisions of this Act."

These provisions make it clear that there are two conditions precedent that must be fulfilled before the court can exercise its jurisdiction to grant an application for an order for evidence to be obtained in the Cayman Islands. The existence of the conditions precedent are not in dispute. Both parties agree that:

> (a) The court must be satisfied that the application is made in pursuance of a request for or on behalf of a court or tribunal (described in the Act as "the requesting Court"); and
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> (b) The court must be satisfied that the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have been instituted or is contemplated before the requesting court.

But beyond this, the battle lines are drawn. The central issues are two-fold:

> **Firstly,** whether the request is made by a tribunal within the meaning of the words "court or tribunal" in section 1(a) of the Schedule to the 1978 Order.
>
> **Secondly,** whether the requested evidence is for purposes of "civil proceedings" (defined in section 9(1) as "proceedings in any civil or commercial matter") within the meaning of section 1(b) of the Schedule to the 1978 Order.

I will consider the issues in turn.

The First Issue - Meaning of "Court or tribunal"

Mr. Bueno, Q.C. submits that "ineluctable logic and common sense dictate that under the 1975 Act [UK], a tribunal such as that established under the 1921 Act is to be treated as a 'tribunal' for the purposes of section 1(a) of the 1975 Act." He contends the 1921 Act, which is common to the United Kingdom and Ireland, is in no way concerned with, and has no application to, Tribunals of Inquiry, other than those expressly appointed following resolution "of both Houses of Parliament that a Tribunal be established for inquiring into a definite matter described in the resolution as of urgent public importance." He

concedes that the proceedings before the tribunal are not concerned with the resolution of private rights, in the context of litigation or analogous dispute resolution. Nevertheless, he contends that its role is very closely concerned with matters of great importance, the resolution of which is of vital public interest. Parliament has endowed the tribunal with the powers of a superior court of law, including the power to enforce the attendance of witnesses, for them to be examined on oath, to compel the production of documents, and to issue "a commission or request to examine witnesses abroad." Without such powers, the activities of the tribunal could be rendered sterile. He concludes, therefore, that "it was the manifest intention of Parliament that a tribunal appointed under the 1921 Act, although not a court, should be placed on the footing of the High Court of Justice for the purposes of conducting its proceedings; and in the context of the legislation which preceded and succeeded its passing, which gave statutory jurisdiction to courts to give effect to letters of request, it can only have been Parliament's intention that such a tribunal was (and is) to be regarded as a relevant "tribunal". He refers to the Foreign Tribunals Evidence Act, 1856; The Evidence by Commission Act, 1859; The Evidence by Commission Act 1885 and The Evidence (Proceedings in Other Jurisdictions) Act, 1975. The substance or pith of his argument seems to be that by referring to "tribunal" in the 1975 (UK) Act, which basically has been made to apply to the Cayman Islands, Parliament must have contemplated that "tribunal" in that Act, and in the

legislation that it replaces, would encompass the type of tribunal set up under the 1921 Act.

Furthermore, the 1921 Act empowers the tribunal to issue letters of request, and so the legislature must have expected foreign Courts to accede to such requests. He urged that in the interest of comity, the application should be granted. He adopted the words of Lord Denning, M.R. in ***Rio Tinto Zinc Corporation v Westinghouse Electric Corporation*** [1977] 3 All E.R. 703 (p. 708), and said it should be "the duty and the pleasure of the {Cayman} Court to do all it can to assist the foreign Court, just as the {English} Court would expect the foreign court to help it in like circumstances."

Before moving on, I must say that I think it is misleading to hold that the tribunal is established or set up under the 1921 Act. The 1921 Act "make provisions with respect to the taking of evidence before and the procedure and powers of certain Tribunals of Inquiry." The 1921 Act may be applied to certain tribunals established by resolution of both Houses of Parliament for inquiring into certain matters of urgent public importance, and when applied, it empowers the tribunal to issue a commission or request to examine witnesses abroad, subject to rules of court. But that does not mean that the foreign court must accede to or comply with the request.

The 1921 Act has no extra-territorial powers. In fact, the decision whether to accede to or refuse the request will depend on the extant statutory provisions in the foreign Court (in the instant case, the Cayman Islands). As Lord Diplock

pointed out in ***Rio Tinto Zinc Corporation v. Westinghouse Electric Corporation*** [1978] 1 All E.R. 434 (p. 461):

> "The jurisdiction of English courts to order persons within its jurisdiction to provide oral or documentary evidence in aid of proceedings in foreign courts has always been exclusively statutory. There is no presumption that Parliament, in repealing one statute and substituting another in different terms, intended to make the minimum changes in the previous law that it is possible to reconcile with the actual wording of the new statute, particularly where, as in the instant case, the new statute is passed to give effect to a new international convention."

Lord Diplock was here referring to the Evidence (Proceedings in Other Jurisdictions) Act, 1975, which repealed the 1856, 1859 and 1885 Acts mentioned above, and which basically has been extended to the Cayman Islands by the 1978 Order. It seems clear that in the instant case, the jurisdiction of this Court to entertain the application is to be found in the actual terms of section 1 of the Schedule to the 1978 Order, and in particular, the construction to be placed on the words "Court or tribunal" and "civil proceedings" used therein.

Mr. Alberga, Q.C. submits that "whatever may be the name or label given to a requesting body, that requesting body does not fall under the umbrella of the words "Court or tribunal", which are used in section 1(a) of the 1978 Order, unless that body is in reality adjudicatory. Any requesting body which is in reality investigatory cannot fall under the umbrella of the words "Court or tribunal". He contends that the requesting body in the instant case is investigatory and not adjudicatory, and

that because of that, this Court has no jurisdiction to grant the request which has been made to it. In support, he relies on the sage words of Lord Fraser in the ***Westinghouse*** case (supra) (at p. 476):

> "The English courts have no power under the 1975 Act, or otherwise, to make orders for giving effect to requests for evidence to be used for such investigatory purposes."

But His Lordship, in my view, was here referring to the use of evidence for the investigatory procedure before a grand jury in the USA and I doubt that the principle enunciated was intended to be of universal application.

The question of whether the foreign requesting body is a "Court or tribunal" for the purposes of section 1(a) of the Schedule to the 1978 Order, must primarily be decided on the evidence of the laws of the requesting country. This is common ground between the applicant and the opposer. But the applicant contends that the instant case is peculiar, in that there can be no conflict of law between the requesting country and the requested country. The 1975 Act, for all purposes material to this application, is the law of The Cayman Islands and must be construed by the Grand Court in precisely the same way as the Act is construed by the United Kingdom. I must examine this contention in light of the authorities.

Mr. Alberga, Q.C. places reliance on the case of ***In Re Imacu Ltd*** [1989] J.L.R. 17, a case decided by the Royal Court of Jersey. The Evidence (Proceedings in Other Jurisdictions) Act 1975 (UK) was extended to Jersey by the Evidence (Proceedings in

Other Jurisdictions)(Jersey) Order, 1983, and is similar in all respects to the 1978 Order. In the ***Imacu*** case (supra), a request was issued by a "juge d'instruction" in Belgium and an order was made by the Royal Court in Jersey in response thereto. Imacu sought to set aside the order on the ground, inter alia, that the order was invalid in that the "juge d'instruction" was not a "Court or tribunal", as required by section 1(a) (of the 1975 Act as extended to Jersey), since his role was merely that of an investigating officer. The order was discharged for the following reasons:

> "(1) The relevant Belgian law, as was the case with all foreign law, could not be judicially noticed by the Jersey court but had to be proved as fact by expert witnesses tendering authorities as evidence of that law. In the event of conflict or confusion arising from the evidence, the court could itself examine and interpret the authorities cited to reach a satisfactory conclusion.
>
> (2) Since the phrase 'court or tribunal' in s.1(a) of the Evidence (Proceedings in Other Jurisdictions) Act 1975 had not an immediately ascertainable meaning in Jersey law, the court had primarily to inquire whether the *juge d'instruction* constituted a 'court or tribunal' under Belgian law but would then only comply with the request it if were satisfied that he was also recognized as such under Jersey law.
>
> (3) The *juge d'instruction* did not constitute a 'court or tribunal' within the meaning of s.1(a), these words being construed as meaning a 'court or similar tribunal,' *i.e.* a tribunal acting in a manner similar to that in which courts of justice act in respect of an inquiry before it, because (a) at the time he made the request his role was wholly investigatory and not adjudicatory, since he was obliged to pass on the results of

> "his preliminary investigations to the *chambre du conseil* and could only sit as a member of a 'tribunal' (the *tribunal correctionel*) once the *chambre du conseil* had committed the suspect for trial by it; (b) he was not an independent adjudicatory authority but had to report regularly to his superior, the Procureur du Roi, on the progress of his investigations; and (c) his investigations were in respect of unknown persons, a concept unknown in Jersey courts and were always conducted *in camera*, without examination or cross-examination of the suspect in accordance with rules of evidence. The order granting assistance to the *juge d'instruction* had therefore been made without jurisdiction and would be discharged."

In my view, the important point in that case is the construction it places on the word "tribunal" in section 1(a) as being "a tribunal acting in a manner similar to that in which courts of justice act in respect of an inquiry before it." The court in Jersey considered the evidence as to the status of the juge d'instruction according to the laws of Belgium, and concluded that he did not constitute either a court or similar tribunal. The 1921 Act is not applicable to Belgium as it is to Ireland, and, therefore, the ***Imacu*** case (supra) did not address the question of whether a tribunal, endowed with the powers of the 1921 Act, inexorably falls within the meaning of 'tribunal" in section 1(a) of the above Schedule to the 1978 Order. It, however, provides guidelines as to the manner in which this Court should approach the question of construction.

The next case that Mr. Alberga, Q.C. refers to is one decided by the Court of Appeal for the Cayman Islands - ***Worldwide Financial Holding v. Citel*** [1994-1995] CILR 391. That

case is not unlike the instant case. Allegations of corruption were made against high-ranking Peruvian Government officials. The Peruvian Congress appointed a special Investigative Commission, ***Citel***, in accordance with the provisions of article 97 of the Constitution and articles 25 and 35 of the Regulations of the Democratic Constitutional Congress. Article 97 empowers the Congress to commence investigations on any matter of public interest. Article 25 of the Regulations provides for Permanent Commissions and Temporary Commissions which may be (a) Investigative Commissions (b) Special Commissions. Article 35 of the Regulations empowers Congress in plenary session to appoint Investigative Commissions for important matters. The President of the Investigative Commission requested the assistance of the Grand Court, and on an ex parte application, an order was made for the examination of certain persons within the jurisdiction. ***Worldwide Financial Holding*** (supra) was affected by the Order, and applied unsuccessfully to have the ex parte order set aside. The central issue on appeal was whether ***Citel*** constituted a "Court or tribunal" within the meaning of section 1(a) of the Schedule to the Evidence (Proceedings in Other Jurisdictions)(Cayman Islands) Order 1978, so as to bestow jurisdiction on the Grand Court to grant the order. Article 97 (supra) states in part that the resolutions of the Investigative Commission do not bind the judicial organs. The Investigative Commission investigates and submits reports to the Congress in plenary session. Their conclusions, if approved by Congress, neither bind the judiciary nor affect the ordinary course of the

judicial process. The result of the investigation is communicated to the office of the Attorney General for the relevant purposes. Zacca, P., who delivered the judgment of the court, said (p. 400):

> "CITEL cannot make any binding decisions. It is in reality a commission mandated to make enquiries which are preliminary to administrative or judicial decision. In our view, the Investigative Commission cannot be regarded as a tribunal to bring it within section 1(a) of the 1975 Act. The Grand Court of the Cayman Islands cannot, in those circumstances, entertain an application from such an Investigative Commission."

It appears that the Court of Appeal, in arriving at its decision, placed some reliance on the textbook of Professor Sir William Wade, ***Administrative Law***, 6th Ed. [1988] at p. 900-901 which distinguishes tribunals from ordinary inquiries. This is how the text reads:

> "In principle there is a clear contrast between the functions of a statutory tribunal and that of a statutory inquiry of the kind discussed in the next chapter. The typical tribunal finds facts and decides the case by applying legal rules laid down by statute or regulation. The typical inquiry hears evidence and finds facts, but the person conducting it finally makes a recommendation to a minister as to how the minister should act on some question of policy, e.g. whether he should grant planning permission for some development scheme. The tribunal need look no further than the facts and the law, for the issue before it is self-contained. The inquiry is concerned with the local aspects of what will usually be a large issue involving public policy which cannot, when it comes to the final decision, be resolved merely by applying law. Tribunals are normally employed where cases can be decided according to rules and there is no reason for the

> "minister to be responsible for the decision. Inquiries are employed where the decision will turn upon what the minister thinks is in the public interest, but where the minister, before he decides, needs to be fully informed and to give fair consideration to objections. *In other words, tribunals make judicial decisions, but inquiries are preliminary to administrative or political decisions, often described as quasi-judicial decisions."*

The views expressed in ***Wade*** (supra) may be contrasted with those of ***Morgan & Hogan Administrative Law in Ireland,*** 24th Ed. [1991] p. 256 et seq. Two types of inquiry are described, but it is this type that is germane to the issues at hand:

> "The second type of inquiry is, in effect, a post mortem: the inquiry is given the task of investigating the causes of accidents, natural disasters or other matters of general public concern. The terms of reference of this type of inquiry - which usually involves fact-finding as to the causes of, (say), a shipping collision and recommendations as to improvements for the future - will usually be 'at large', simply because the conclusions of the inquiry cannot be anticipated in advance. The most dignified and high powered example of this latter type of inquiry is one which is constituted under the Tribunals of Inquiry (Evidence) Acts 1921 - 1979. [Emphasis supplied] However, there is also specialised legislation regulating accidents involving railways, shipping and aeroplanes.
>
> Both types of statutory inquiry may be regarded as having many of the characteristics of a Tribunal for the procedures adopted before an inquiry and a Tribunal are similar in that each of them approximates to that of a court. However, there are three differences between a Tribunal and an inquiry. First, the latter's conclusions do not bind the Minister or other responsible decision making authority, though in practice it

> "would be rare for the Minister to depart from the conclusions of at any rate, the first type of inquiry. Secondly, an inquiry is set up ad hoc for each episode examined; whereas a Tribunal enjoys a continuous existence. Finally, whilst a Tribunal is a decision making body, an inquiry may be regarded as an instrument of participation in government."

The Supreme Court of Ireland considered the status of a Tribunal of Inquiry in the case of ***Goodman International and Laurence Goodman v. The Honourable Mr. Justice Liam Hamilton, sole member of the Tribunal of Inquiry in the Beef Processing Industry, Ireland and the Attorney General*** [1992] 2 Irish Reports 542. The Dáil Eireann and Seanad Eireann, by resolutions, established a tribunal of inquiry to inquire into certain matters of urgent public importance which consisted of allegations of illegal activities, fraud and malpractice in and in connection with the beef-processing industry. The Order which established the Tribunal of Inquiry also appointed the President of the High Court as the sole member of the Tribunal of Inquiry, and it provided that the provisions of the Tribunal of Inquiry (Evidence) Act, 1921, as adopted, and the Tribunal of Inquiry (Evidence)(Amendment) Act, 1979, should apply to the tribunal. It should be noticed that the Tribunal of Inquiry established in that case is similar in all respects to that of the instant case. In considering the constitutionality of such a tribunal, the Irish Court took into account the status of the tribunal. In his judgment, Findlay, C.J. said:

> "My conclusion is that the activities of the inquiry are not in any way the exercise of a judicial power or function, it being no part of a judicial function,

> "nor part of the judicial domain to ascertain the truth or falsity of facts and report them to parliament."

The learned Chief Justice categorises the activities of such tribunals as "a simple fact-finding operation, reporting to the legislature." He adopted as being appropriate, the test set out in the judgment of Kenny, J. In ***McDonald v. Bord na gCon*** [1965] 1 I.R. 217 as to the meaning of the constitutional concept of the administration of justice in Ireland. This is what is stated:

> "It seems to me that the administration of justice has these characteristic features:
>
> > (1) A dispute or controversy as to the existence of legal rights or a violation of the law.
> >
> > (2) The determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty.
> >
> > (3) The final determination (subject to appeal) of legal rights and liabilities or the imposition of penalties.
> >
> > (4) The enforcement of those rights or liabilities or the imposition of a penalty by the court or by the executive power of the State, which is called in by the court to enforce its judgment.
> >
> > (5) The making of an order by the court, which as a matter of history, is an order characteristic of courts in this country.
>
> I am satisfied that with the possible exception of the first clause in this statement of the characteristics of the administration of justice, where it speaks of a controversy as to the existence of a violation of the law, the activities of

> "this tribunal of inquiry fulfils none of the other fundamental conditions or characteristics of the administration of justice as laid down in this case. It can be argued, I suppose, that by reason of the inquisitorial nature of the tribunal that it is not accurate to speak of a controversy concerning the violation of the law, but even if it is, and I would incline to the view that it would come within that category, that fact alone could not conceivably make the proceedings of this tribunal an administration of justice within the meaning of Article 34 of the Constitution."

These cases, in my view, clearly establish that a tribunal, such as that in question, although endowed with powers under the 1921 Act, is not a "Court or tribunal" for the purposes of section 1(a) of the Schedule to the 1978 Order. The mandate itself undoubtedly suggests that an inquisitorial and not an adjudicatory body has been established. The resolutions of the Parliament are not directed at the establishment of a tribunal that is to exercise judicial functions. It is a tribunal of inquiry. As Hederman, J. opined in the ***Goodman*** case (supra), "The fact that powers similar to those exercised by the High Court are conferred on a particular administrative tribunal or tribunal of inquiry, does not constitute such bodies courts", and I may add, or tribunals for the purposes of section 1(a) of the Schedule to the 1978 Order. I accept as correct in law the meaning placed on the words "Court or tribunal" in the ***Imacu*** and the ***Citel*** cases (supra) as "court or similar tribunal".

The concept of statutory tribunals that are similar to courts of law has long been established in the English legal system. By Magna Carta, medieval traders were assured the right

to trade freely throughout England. The *consuetudo mercatorum* was enforced in the pie powder courts held in the fairs and market towns. But in the boroughs and the staple towns were tribunals, of greater prestige, which also heard the causes of merchants by summary process and in accordance with the *consuetudo mercatorum* (see ***Lectures on Legal History*** 2 ed. By W.J.V. Windeyer). The Law Merchant was administered by those special courts until the 18th century, when Lord Chief Justice Mansfield made it a part of the common law of England. But other statutory tribunals, similar to courts, have been established by Parliament from time to time, e.g. The Rent Tribunals, The Mental Health Review Tribunal, The Agricultural Land Tribunals, The Industrial Disputes Tribunal, and numerous others. Such tribunals "find facts and decide the case by applying legal rules laid down by statute or legislation." Their decisions are final (subject to appeal) in the sense that they do not report to anyone.

The functions of the tribunal in question are to enquire urgently into, and report to the clerk of the Dáil and make such findings and recommendations as it sees fit, in relation to definite matters of urgent public importance. The findings of fact that it arrives at are not legally binding. Its function involves an investigatory process, and its conclusion do not bind Parliament, which is entrusted with the ultimate decision in the matter. On the evidence and on the authorities, I am satisfied that the tribunal in question is not similar to a

court, either according to the laws of Ireland or the laws of The Cayman Islands.

It is my judgment that the Tribunal of Inquiry (Dunnes Payment) appointed by instrument of An Taoiseach of Ireland on the 7th February, 1997, is not a "Court or tribunal" for the purposes of section 1(a) of the Schedule to the 1978 Order. Accordingly, this Grand Court has no jurisdiction to make the Order sought in the application pursuant to the request from the foreign tribunal.

My decision, which I have just expressed, is sufficient to dispose of the application, but it is incumbent on me to consider the other important issue that was fully argued, in the event that my decision on the first issue is wrong.

The Second Issue - Meaning of "Civil Proceedings"

The second condition precedent to the jurisdiction of the Grand Court to grant the request is set out in section 1(b) of the Schedule to the 1978 Order. The court must be satisfied:

> "(b) That the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated."

Section 9(1) of the Schedule to the 1978 Order provides that civil proceedings, in relation to the requesting court, means proceedings in any civil or commercial matter.

Mr. Bueno, Q.C. submits that the expression "civil proceedings", for the purposes of both section 1 of the 1975 Act and the 1856 Act, is not a term of art. He says that whilst it

plainly includes proceedings before a judicial or quasi-judicial tribunal with jurisdiction to determine or resolve private rights, a meaning restricted to litigation or the like would do violence to the intention of the 1921 Act.

The construction to be placed on section 9(1) of the 1975 Act (which is in pari materia to section 9(1) of the Schedule to the 1978 Order) was considered by the House of Lords in ***Re State of Norway's Applications (Nos. 1 & 2)*** [1989] 1 All ER 745. Lord Goff of Chieveley, who delivered the leading opinion of their Lordships' House, after tracing the relevant legislation before the 1975 Act, concluded that the words "civil or commercial matter" in the 1975 Act cannot be construed with reference to any internationally accepted meaning." The relevant section of the headnote reads as follows:

> "On the true construction of section 9 of the 1975 Act the question whether proceedings were a 'civil or commercial matter' depended on the classification of those proceedings according to the law of the requesting court and the law of the court to which the request was made (i.e. English Law), since the classification could not be made by reference to any internationally acceptable classification. In answering that question the English court was required to determine according to the law of the requesting court how the proceedings would be classified under the law and practice of that state, having regard to the manner in which classification was ordinarily made in that country, and then to determine according to English Law whether the proceedings were civil proceedings on the basis that all proceedings other than criminal proceedings were civil proceedings."

The principles enunciated by their Lordships' House in ***Norway's Applications*** (supra) cannot be faulted. But it seems to me that they are only applicable where the requesting body is found to be a "Court or tribunal" within the meaning of section 1(a). The classification of the proceedings then as either civil or criminal would be necessary. If the proceedings are classified as "criminal", then the Court would not have jurisdiction to grant the request unless proceedings have been instituted. The Order, if made, is limited to the examination of witnesses, either orally or in writing, and for the production of documents [section 5(1)].

The Court would have jurisdiction to grant the order where it is shown that the proceedings are "civil", which either have been instituted before the requesting Court or whose institution before that Court is contemplated[(section 1(b)]. However, my decision on the first issue renders this secondary issue otiose. It is only if I am wrong on the first issue that it would be necessary to decide this issue. In such an unlikely event, I would be prepared to decide this issue on the wide interpretation opined by their Lordships in ***Norways Applications*** (supra). I have considered the relevant evidence contained in the affidavits of Gerard Hogan and John O'Donnell, and I am satisfied that if the requesting body is classified as a "Court or tribunal", within the meaning of section 1(a), then in such case, the proceedings before it on the broad interpretation, would not be criminal but civil proceedings.

Conclusion

The application is refused, with costs to the opposer to be taxed if not agreed. (Certificate for Queen's Counsel).

Dated 30th day of June, 1997.

(Sgd.) C. A. Patterson
Judge of the Grand Court (Ag.)