

Ms Joanne Mak
By Fax: 2509 0775/25099055
Senior Council Secretary
Home Affairs Panel
Legislative Council Secretariat
3/F Citibank Tower
3 Garden Road
Central
Hong Kong

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Dear Ms Mak,

We refer to Anna Wu's letter dated 18 March 2005 [LC Paper No. CB (2)1128/04-05(01)] to the Legislative Council Home Affairs Panel regarding the "Report of the Independent Panel of Inquiry on the Incidents Relating to the Equal Opportunities Commission."

At paragraph 4 of her letter, Anna Wu stated that, "*In justifying the [Independent] Panel's refusal to give me access to documents, transcripts and supporting documents, its solicitors cited Re: National Irish Bank Limited [1999] 3 I.R.145 & 190. My lawyers pointed out to the [Independent] Panel that the case provided that when adverse conclusions may be drawn against individuals on the testimony of others, "such individuals at risk will be entitled to attend, hear the evidence, cross-examine the witnesses and give evidence themselves."* The [Independent] Panel and its solicitors then refused to accept the logical implications of a case they cited."

Anna Wu claimed that the Independent Panel had acted against the findings of the Irish High Court's decision in *National Irish Bank Limited [1999]*. Her comments were unfairly made against the Independent Panel and they made readers feel as if the Independent Panel were biased towards her. Aroused by this serious comment against the Independent Panel, we checked the case cited by Anna Wu and found out what Anna Wu had said in her letter about the case was neither full nor complete.

In the *National Irish Bank Limited [1999]* case cited by Anna Wu, the Applicants, i.e. the National Irish Bank Limited ("the bank") and the National Irish Bank Financial Services Limited ("the company") were both under investigation by Inspectors appointed by the Irish High Court pursuant to the provisions of Part 2 of the [Companies Act, 1990](#) of Ireland. The Applicants

sought two orders which, if granted, would have affected the conduct of the investigations.

The first order was sought to limit the Inspectors in their investigation of compliance by the bank with its obligations concerning Deposit Interest Retention Tax. The second order was sought to compel the Inspectors to furnish to the bank and the company copies of all of the transcripts and supporting documentation relating to interviews carried out by the Inspectors with staff and customers of both entities.

Anna Wu, sought similar discovery of evidence of witnesses and documents from the Independent Panel, just as what the Applicants did in *National Irish Bank Limited [1999]*.

The following is an extract of what the Irish High Court had found and decided:

"The Legal Position"

81. The Applicants say that having regard to the position in *Re Haughey* [1971] IR 217 they should now be entitled to the documents which they seek. This is so notwithstanding the fact that the Inspectors are at this stage only engaged in the first stage of their investigation, namely information-gathering. I have formed the view that the Applicants have misconceived the functions of Inspectors appointed under the provisions of the [Companies Act, 1990](#). An inspection of this type is primarily investigative. It only becomes adversarial in limited circumstances. In *Chestvale Properties Ltd. -v- Glackin* [1993] 3 IR 35, Murphy J. cited with approval the observations of Sachs L.J. in *Re Pergamon Press Limited* [1971] Ch. 388. That judge said that Inspectors appointed under the Companies Acts start

"very often with a blank sheet of knowledge [and] have to call for information in whatever way it can best be obtained. That may be by interview, it may be from statements obtained in writing, it may be from accounts and other documents, or it may be by their exercising their powers under [Section 167, subsection 3](#) to put questions to individuals, either on oath or not on oath.

One way or another it may be a considerable time before the inspectors have before them sufficient information to see any pattern in the affairs of a company. Even when this pattern commences to take shape, they may need further material before the possibility emerges of any criticism attaching to individuals. Moreover, that possibility may derive from documentary evidence which is in substance uncontested, or it may derive from a matter on which there may be a conflict of evidence between some witness and the person to whom blame may be attributed. In the latter case there may come the stage when the inspectors have to decide whether simply to record that conflict or whether to seek to resolve it. The more complex the affairs of the company and the greater the

number of subsidiary companies, the longer it may take before those respective stages are reached".

82. Murphy J. went on to say:-

"The present proceedings were instituted when the inquiry had reached only a very preliminary and exploratory stage. ... Even if the presumption were otherwise and that one should anticipate a stage being reached in which the Respondent would find it necessary to make a choice as between conflicting claims, it is clear that that stage has not yet been reached. Accordingly, the present application is premature insofar as it is based upon the contention that the inspector is engaged in a task which at present involves him in a quasi-judicial function".

83. In the present case it is to be noted that the Inspectors are only at a preliminary stage of their investigation and have not been called upon to exercise any quasi-judicial functions since that will not arise until stage two is reached. At stage two of their investigation they have, in my view, made it clear that all of the rights to which a party might be entitled under the decision in Re Haughey will be respected.

84. The English inquiry which gave rise to the decision in Re Pergamon Press Ltd. spawned further litigation which was also dealt with in the Court of Appeal. It was Maxwell -v- The Department of Trade and Industry and Ors [1974] 2 All ER 122. There Lord Denning M.R., called attention to what an investigation under the Companies Act is not. He said, at page 127:-

"Remember what it is not. It is not a trial of anyone, nor anything like it. There is no accused person. There is no prosecutor. There is no charge. It is not like a disciplinary proceeding before a professional body. Nor is it like an application to expel a man from a trade union or a club, or anything of that kind. It is not even like a committee which considers whether there is a prima facie case against a person. It is simply an investigation, without anyone being accused."

85. Insofar as this jurisdiction is concerned that, in my view, is a correct summary of the position which obtains at least insofar as the investigatory stage of the Inspectors' task is concerned. Once one moves into the second stage then, whilst the investigation is not transformed into an adversarial hearing, nonetheless fair procedures have to be observed insofar as any adverse conclusions may be drawn in relation to individuals. The procedure which the Inspectors have outlined as one which they will follow if such a stage is reached is in complete compliance with their obligations to observe fair procedures under the relevant jurisprudence. It follows therefore, that I take precisely the same view as did Shanley J. that there is no entitlement to invoke the rights established in Re Haughey at the information-gathering stage of the Inspectors' work.

86. There remains just one further argument to be dealt with. It has been said on the part of the Applicants that Shanley J. described the rights identified by the Supreme Court in the case of *Re Haughey* as rights which the Court believed should be afforded to a person who had been accused of conduct reflecting on his character and good name and where the accusations were made upon the hearsay evidence of a witness before the public accounts committee of Dáil Éireann. He went on then to state that whilst allegations of the commission of criminal offences had been made in the media against the bank, the case differed from the Haughey case where the accusations were made by evidence under oath. It is submitted that this was the distinguishing feature which triggered the *Haughey* rights. Two observations may be made concerning this submission. First, whilst the Applicants are correct in pointing out the distinction which Shanley J. drew between unsworn allegations and allegations which were given in the form of evidence nonetheless in the immediate following paragraph of his judgment he makes it clear that there is no entitlement to invoke the panoply of rights identified by the Supreme Court at the information-gathering stage of the Inspectors' work.

87. Secondly, whilst the distinction is drawn between allegations made in newspapers and evidence tendered on oath, it does not appear to me that such a distinction triggers the entitlement to the rights identified in the *Haughey* decision. The examination of interviewees under oath is but one of the methods available to Inspectors conducting an investigation under the [Companies Act](#). But it is not the mere fact of the making of an allegation under oath which elevates the status of an accusation to one which calls for a response. What brings that about is a determination by the Inspectors (a) that they will admit such an allegation as evidence and (b) that the admission of it may give rise to adverse conclusions being drawn against the party accused. It is then and only then that the rights identified by the Supreme Court in *Re Haughey* come into play.

88. In his closing submission, Counsel on behalf of the Applicants sought to argue that they are in the position of an accused person and that such a person is entitled to have a book of evidence served upon him so as to enable him to prepare his case. A similar right should be afforded to the Applicants it is said. This analogy, in my view, underscores the unsustainable nature of this application.

89. True it is that an accused person is entitled to a book of evidence. But before that stage is reached there is (a) a Garda investigation, (b) the submission of the appropriate papers to the Director of Public Prosecutions, (c) a decision by the Director of Public Prosecutions to prosecute and (d) the preferring of the charges with a view to a preliminary investigation and a return for trial.

90. If the analogy with a criminal case is accepted, it is clear that at this stage neither of the Applicants could be regarded as the equivalent of an accused person. This investigation is only at the same stage as the preliminary police investigation. Counsel could not cite any authority to the effect that a potentially accused person is entitled to

copies of statements made to the police in the course of their investigation. I do not believe that there is any such authority. Neither could there be any legal basis for such an entitlement. First, the police investigation may not result in any charges being preferred and secondly, such an exercise would entirely hamper the conduct of an investigation. In my view, the same result would be had here. When the Inspectors come to stage two of their investigation there may be nothing for the bank or the company to answer. Secondly, the correspondence from the Solicitors for the Applicants makes it clear that they wish to have these documents so that they may at this stage respond to the allegations made. Such an exercise would merely prove a hindrance to the Inspectors in the carrying out of their functions is unnecessary and would be wasteful of both time and resources.

Conclusions

91. For the reasons that I have already stated I am satisfied that neither of the applications before me should succeed.

92. I have already made it clear that the Court disapproves of the unjustified criticism and the intemperate language that was used to make it concerning the work undertaken by the Inspectors. It is also a matter of regret that the Inspectors have had to place on record their belief that the Applicants have not co-operated with them to the utmost extent possible. I hope that it will not be necessary for the Inspectors to repeat such a view in the future.

93. These applications are dismissed.”

Anna Wu said that, citing the *National Irish Bank Limited [1999]* case: - individuals at risk of adverse conclusions being drawn against them on the testimony of others are entitled to attend, hear the evidence, cross-examine the witnesses and give evidence themselves. But contrary to what Anna Wu said, the Irish High Court stated that such rights were applicable to accused persons in a criminal case and more importantly, there was no legal authority to the effect that a potentially accused person was entitled to copies of statements made to the police in the course of their investigation. Even if the Inspectors' investigations were analogous to a police investigation, the Irish High Court said that the rights (which Anna Wu claimed to have) did not arise.

Anna Wu was not an accused person. Neither was the Independent Panel conducting a criminal investigation. Based upon the Irish High Court's decision, there was no legal basis at all for Anna Wu to have made the requests that she made. Having read in full the *National Irish Bank Limited [1999]* case, we disagree with what Anna Wu had said about the Independent Panel's decision.

The Irish High Court remarked that: - “It disapproved the unjustified criticism and the intemperate language that was used by the Applicants concerning the work undertaken by the Inspectors. It is also a matter of regret that the Inspectors have had to place on record their belief that the Applicants have not co-operated with them to the utmost extent possible.”

Anna Wu made remarks in public about the Independent Panel’s partiality from the outset of the investigation and she refused to attend the Independent Panel’s interview. We think the Independent Panel had been most kind and modest in not reprimanding those who refused to co-operate with the Independent Panel when compared to the stern remarks of the Irish High Court towards the Applicants for their unjustified criticisms, intemperate language and un-cooperative attitude.

The comments in Anna Wu’s letter had cast doubts in the minds of the right thinking public on the credibility of the Independent Panel. The Independent Panel had done its best in the most trying situation to finish its task for which praise must be given. We particularly admired the Independent Panel’s acquiescent attitude towards biased remarks from political groups and those under investigations. The motives of those who made biased remarks during the investigation process were unclear to us. We should be grateful if the Legislative Council Secretariat could place this letter on record as a LC Paper of the Home Affairs Panel meeting of 8 April 2005 to reflect our concerns and views and our praise for the good work of the Independent Panel.

Yours faithfully,

The EOC Concern Group