



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

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

THE SOLE MEMBER
Mr. JUSTICE FEARGUS M. FLOOD

**Decision on the procedures to be adopted in respect of the
cross examination of Mr. James Gogarty**

Monday 1st February 1999 at 2.15pm

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of the cross examination of Mr. James Gogarty**

This application arises from a letter written by the Tribunal to the parties on the 18th of January 1999. In that letter it was stated:-

"such persons who have not furnished a statement of their evidence on a particular issue in advance, shall not be entitled to cross examine Mr. Gogarty on that issue until after they have given their own oral evidence on the issue."

The reason that that letter was written was that the Tribunal was not satisfied that all of the parties had provided full statements of the evidence which they intended to give to the Tribunal. It is a well established principle of law that where it is intended to call evidence

before a Tribunal which may affect the interests or reputation of any person, that person is entitled to be given advance notice of such evidence. The stated objective of this letter was, as stated in previous correspondence to some of the parties, to "level the pitch" for parties who had co-operated with the Tribunal by providing a statement of their evidence in advance for circulation to other affected parties, in other words, to ensure fairness for all parties.

Counsel to the Tribunal has opened the extensive correspondence which has been exchanged between the Tribunal and a number of parties in which the Tribunal has endeavoured, with varying degrees of success, to obtain full and timely statements of the evidence of the witnesses who are required to give evidence. In the course of that correspondence the Solicitors for Mr. Gogarty, by letter dated the 17th of January 1999, complained that Mr. Bailey had not, in his statement,

adequately dealt with the issue referred to in paragraphs 64 and 65 of Mr. Gogarty's affidavit. They indicated that they would object to their client being cross examined by Mr. Bailey's Counsel until a supplemental statement dealing with this issue had been obtained.

The shortcomings in the statements which had been submitted by some parties, as identified by Counsel to the Tribunal, related to the statements of evidence furnished by the Murphy parties, Bailey/Bovale and Ray Burke. He complained that, in general, these parties did not, as they were requested by the Tribunal, provide full narrative statements of their version of the events referred to in Mr. Gogarty's affidavit.

Counsel to the Tribunal said that there was an impression from the statements from these parties that we did not have the full story and that there was a real likelihood that we were going to be faced with a situation

where matters adverse to his character and good name would be put to Mr. Gogarty of which he and the Tribunal had no prior notice.

Counsel to the Tribunal suggested possible solutions. One was that the parties might submit further statements. The other was that all cross examination be deferred until after each party had given their evidence in chief. In that way, it was suggested, all parties would have advance notice of the case being made by the others. He submitted that a Tribunal has complete flexibility in the matter of procedures subject only to the overall requirement to act fairly. He referred me to the six cardinal principles identified in the Salmon Report and to the subsequent comment on these principles by Mr. Justice Croom Johnston in the "Report of the Tribunal appointed to inquire into certain issues arising out of the operations of the Crown Agents as Financiers on own account in the years 1967-1974" and of Sir Richard Scott

in his Spring lecture to the Chancery Bar of the 2nd of May 1995 which is reported in the October 1995 edition of the Law Quarterly Review. Counsel submitted that in adopting this procedure all of the procedural requirements identified by the Supreme Court in the case of In re Haughey [1971] I.R. 217. would be met. Finally he referred me to the observations of Hederman J in the case of Goodman International and Laurence Goodman v The Honourable Mr. Justice Liam Hamilton [1992] IR 542.

Counsel for Mr. Gogarty supported the proposal to defer all cross examination until after all parties had given their evidence in chief. He said that procedural fairness required that since his client had made full disclosure in advance, other parties should be required to do the same. He pointed out that this is an inquiry; it is not a criminal prosecution or a lis inter partes and he relied upon the decision of the European Commission on

Human Rights in Goodman International & Goodman v Ireland, European Human Reports, [1992] Commission Digest 26.

Counsel on behalf of the Murphy parties submitted that the basis had not been laid for either of the courses suggested by Counsel to the Tribunal. He drew attention to the fact that the observations of Sir Richard Scott in relation to the procedures to be adopted by Tribunals of Inquiry were criticised by Sir Geoffrey Howe. He submitted that such procedures were not permissible in this jurisdiction because they would not comply with the requirements laid down by the Supreme Court in the case of In re Haughey. He made the point that the legal jurisprudence on Tribunals is established in the six cardinal principles in Salmon and the four requirements set out in In re. Haughey, both of which have been approved by the Supreme Court in Bohan v United Farmers Association [1993] I.R. He did not, however,

deal with the point that the statements which had been submitted by his clients had been truncated nor did he offer to furnish further statements.

Counsel for Mr. Bailey relied on precedent. He referred to the procedures implemented by previous Tribunals and he suggested that this established some sort of a benchmark, departure from which would be legally unsafe. He submitted that the course suggested by Counsel to the Tribunal would not pass the *In re Haughey* test and would infringe his clients constitutional rights. He submitted that the legislation did not give a power to a Tribunal to compel a person to furnish a narrative statement. He said that his client was in a different position to that of Mr. Gogarty in that Mr. Gogarty was in the position of an accuser and his client was in the position of an accused person.

I have read the statements of evidence submitted on behalf of these parties. The statements appear to fall short of the detailed narrative statements which these parties were requested by the Tribunal to provide. I am also of the opinion that the concerns expressed by Mr. Gogarty's Solicitors in their letter to the Tribunal of the 17th January 1999 may not be unreasonable.

Having considered all the submissions made to me by Counsel I am satisfied that a Tribunal of Inquiry does have flexibility in respect of what procedures it adopts, subject only to the overall requirement of fairness. I do not accept the proposition that this Tribunal is bound by some procedural straight jacket created by the precedent of procedures adopted by previous Tribunals. Different Tribunals have different procedural requirements and the Courts have repeatedly underpinned the proposition that Tribunals are masters of their own procedures.

Neither do I accept that the procedure suggested by Counsel to the Tribunal does not comply with the principles of fair procedures set out in the case of In re. Haughey. The relevant principle is the right of a person ".....to cross examine, by Counsel, his accuser or accusers.....". Counsel to the Tribunal did not suggest that this right be removed, but merely that it be deferred. The course suggested by Counsel to the Tribunal appears to me to be a sensible one and would, in normal circumstances, provide a solution to the problem. However, regrettably, the circumstances are not normal. It has been clearly flagged to the Tribunal that if this course is adopted it will be challenged in the Courts.

The exercise which the Tribunal is engaged in at present is the taking of Mr. Gogarty's evidence and related evidence out of turn because of Mr. Gogarty's age and state of health. The adoption of any course by me which would have the apparently inevitable result of creating a

delay of six months or more while the matter is being litigated in the Courts would be incompatible with this objective in that the act would be a negation of the reason for taking his evidence out of turn. Consequently, this is an option which is not available to me.

The rationale of the legal requirement that a person should be furnished in advance with a copy of the evidence which may reflect on his good name is that it would be unfair to, as it were, "spring" such evidence on him for the first time in the witness box. As a matter of basic fairness he should have the opportunity, if necessary, of taking legal advice on the evidence to be adduced. I am obliged to ensure fairness of procedures as much for Mr. Gogarty as for anybody else. It appears to me that there is a distinction to be made between, on the one hand, cross examining a witness on the basis of merely challenging the veracity of his evidence, perhaps on the basis of inadequacy of recollection, self interest,

incompleteness of information and so forth and, on the other hand, cross examining a witness by putting to him matters which involve positive accusations of wrongdoing or misconduct on his part of which he had no prior notice. In my view the latter scenario would, in the ordinarily understood sense of the word, and in its legal sense, be unfair. I utterly reject the suggestion that any steps which I take to avoid such unfairness involve any form of favouritism of Mr. Gogarty.

I have decided that the procedure which will be adopted at this stage will be as follows:-

1. Counsel for the Murphys/JMSE, Bailey/Bovale and Mr. Burke and such other parties which I may permit will be allowed to cross examine Mr. Gogarty at the conclusion of his examination by Counsel to the Tribunal.

2. If any party puts to Mr. Gogarty any matter of which there has been no prior notice and which involves an assertion of wrongdoing or impropriety on his part, Mr. Gogarty may, if appropriate, be given an opportunity to consider the matter and to consult with his lawyers.

I should stress that these procedures apply as much to the other parties involved with this Tribunal as they do to Mr. Gogarty.

In addition, I repeat what I said at the commencement of this sitting namely that I expect Counsel, when cross examining Mr. Gogarty, and, indeed, all witnesses before this Tribunal to conduct their examination of witnesses with courtesy and respect.

Mr. Justice Feargus M. Flood

Sole Member of the Tribunal

1st February 1999