

**UNAPPROVED****1            DECISION OF SOLE MEMBER IN MATTER OF MEDIA  
REPRESENTATION****2            IN GUERNSEY ON 24TH SEPTEMBER 1999:**

3

4            REGISTRAR: Decision in regard to the application by  
5            members of the media to be present at the examination of  
6            Mr. Joseph Murphy.

7

8            CHAIRMAN: This is an application by counsel on behalf  
of

9            RTE, the Irish Times, Irish Independent, now the Cork  
10            Examiner and TV3, at the taking -- for journalists to be  
11            present at the taking of the evidence of Mr. Joseph  
Murphy

12            Snr. in Guernsey by way of commission to take evidence -

13            the commissioner in this instance being the Sole Member.

14

15            The procedure to take evidence by way of commission is  
16            authorised by Section 1 of the Tribunals of Inquiry  
17            (Evidence) Act 1921 and the procedure to be followed is  
18            similar to that to be followed in the High Court.

19

20            The circumstances under which a commission for the  
21            examination on oath of a witness arises "where it shall  
22            appear necessary". That's a quotation from the Rules of  
23            the Superior Courts. The deposition of the witnesses  
is

24 taken on oath before the Commissioner, in this instance  
the

25 Sole Member, and the deposition of such witness is  
adduced

26 in evidence in such circumstances as the Tribunal may

27 direct.

28

29 The standard procedure in courts of law is that the

30 deposition is read into the record of the court and  
forms

31 part of the oral testimony considered by the court, and  
it

32 is intended that like procedures should be followed in  
this

1 instance.

2

3 The normal circumstances under which a Commissioner is  
4 appointed to take evidence in relation to litigation  
before

5 the High Court is where a witness is, by virtue of  
physical

6 infirmity, unable to attend at court. I have an  
abundance

7 of evidence in relation to Mr. Joseph Murphy Snr., that  
he

8 fulfills that category of witness and that it is  
necessary

9 to take his evidence on commission on the island of

10 Guernsey in the Channel Islands.

11

12 The provisions of the Rules of the High Court require  
that

13 the examination shall take place in the presence of the  
14 parties, their counsel, solicitors or agents, and the  
15 witnesses shall be subject to cross-examination; to  
16 examination, cross-examination and re-examination. It  
is  
17 further provided that the deposition shall be taken down  
in  
18 writing and when completed shall be read over to the  
19 witness and signed by him in the presence of the  
parties,  
20 or such of them as may think fit to attend. There is  
21 further a provision that the completed document shall be  
22 filed in the Central Office of the High Court, and in  
this  
23 instance, where it is taken in relation to a Tribunal,  
in  
24 the office of the Tribunal.  
25  
26 Arrangements have been made for the attendance in  
Guernsey  
27 of counsel and solicitor for all parties to the  
Tribunal,  
28 who are likely to be directly affected by the deponent's  
29 evidence, and an opportunity has been furnished to all  
30 parties to have representation in the Tribunal to -- and  
an  
31 opportunity has been made available to all parties who  
have  
32 representation, to make application to the Tribunal for  
  
1 such representation.  
2  
3 Application has been made and representation granted at  
the

4           said sitting in Guernsey to:

5           (A) The Tribunal, by way of one counsel and solicitor.

6           (B) Counsel for Joseph Murphy Snr., counsel and  
solicitor

7           or such other members of his legal team as he shall

8           determine.

9           And (C) Counsel and solicitor on behalf of Mr. James M

10          Gogarty.

11          .

12          No other party with representation before the Tribunal  
has

13          made application prior to this application by the media.

14          .

15          In ordinary circumstances, where such commission to take

16          evidence sits, the commission sits in private.    The  
Rules

17          of the Superior Courts are in fact silent as to whether  
a

18          commission shall sit in private or public.    The  
transcript

19          of such proceedings duly authenticated is then read into

20          the record of the public, of the proceedings in public  
and

21          forms part and parcel of the public proceedings in the

22          matter.

23          .

24          In such circumstances as has arisen, that evidence has  
been

25          taken, in the past in foreign countries, the proceedings

26          have in fact been held in private.    Both in this country

27          and in such foreign venues, when a commission is taking

28 evidence the court is acting in the course of its  
function  
29 of administering justice, which in the absence of  
special  
30 statutory provision must be done in public.  
31 .  
32 There is an abundance of authority for the proposition  
that  
1 proceedings before this Tribunal are not proceedings in  
the  
2 course of the administration of justice.  
3 .  
4 In the circumstances, prima facia, the Tribunal is  
entitled  
5 to take evidence on commission in private. It is true  
6 that this is a public sitting of the Tribunal, but that  
the  
7 public aspect of the sitting is catered for by the  
8 publication in the public sitting of the Tribunal of the  
9 evidence in question by recording the deposition in the  
10 records of the public sitting.  
11 .  
12 The Tribunal does not have any specific written rules of  
13 procedure, but it is obliged to carry out its functions  
in  
14 accordance with the rules of natural justice and of fair  
15 procedures. Fair procedures require that notice shall  
be  
16 given of the evidence likely to be given by, of the  
17 witness, before the Commissioner of all persons who may  
be  
18 adversely affected by it, to all persons who may be

19           adversely affected by it.   Such persons are as a matter  
of  
20           right, entitled to attend and cross-examine the witness  
in  
21           question and thereby protect their personal integrity  
and  
22           reputation.   Notice has been given of the evidence  
likely  
23           to be given by Joseph Murphy Snr. to all persons likely  
to  
24           be affected by him and thereby the principles of fair  
25           procedure have been accommodated and observed.  
26  
27           The media organisations, through their counsel, have  
28           claimed a right to be present at the said private  
sittings  
29           in the, of the Tribunal in Guernsey.   The grounds on  
which  
30           they have claimed to be entitled are set out in careful  
and  
31           succinct submissions in writing furnished by them and  
32           annexed hereto.

1  
2           In the light of those submissions and on the oral  
3           submissions and on the procedures I have outlined above,  
I  
4           now come to decide whether to accede to that request.

5  
6           The position of the media in the courts of justice in  
7           Ireland is set out in the judgement of the Central  
Criminal  
8           Court in a judgement of DPP V MC, delivered on the 16th  
of

9 June, 1995, and in particular on pages 7, 8 and 9 on the  
10 transcript of that judgement.  
11 .  
12 I was the judge who delivered that judgement, and in the  
13 course of that judgement I observed: "The presence of  
14 media in court, the a fair and accurate reporting of any  
15 proceedings, and subsequent fair comment of any legal  
16 issue, evidence or persons involved in the  
administration  
17 of justice is an indispensable aid to the system of  
justice  
18 in this country. In my view, trials derived their  
19 legitimacy and integrity from being conducted in  
public".  
20 .  
21 This core value has been neatly summarised by Judge  
Bertha  
22 Wilson in Edmonton Journal, be the Attorney General of  
the  
23 state of Alberta, 1989, 64, Dominion Law Reports (4th)  
24 577. A decision of the Supreme Court of Canada where  
she  
25 stated:  
26 .  
27 "The public interest in open trials and in the ability  
of  
28 the press to provide complete reports of what takes  
place  
29 in the courtroom is rooted in the need of:-  
30 (1) To maintain an effective evidentiary process,  
31 (2) To ensure a judiciary and juries that behave fairly  
and  
32 sensitively to values espoused by society,

1 (3) To promote a shared sense that our courts operate  
with  
2 integrity and dispense justice,  
3 (4) To provide an ongoing opportunity for the community  
to  
4 learn how the justice system operates and how the law  
being  
5 applied daily in the courts affects them".  
6

7 I went on to say that the media in this country has  
always  
8 enjoyed a special position and that the reason why the  
9 courts have been accorded that special position is  
10 encapsulated in the judgement of Lord Donaldson, former  
11 Master of the Roles, in the Attorney General V Guardian  
12 Newspapers (2) 1988, 3 All England Reports, 595, where  
he  
13 stated at page 600 as follows:

14  
15 "The special position exists not because of any special  
16 wisdom, interest or status enjoyed by proprietors,  
editors  
17 or journalists, it is because the media are the eyes and  
18 ears of the general public. They act on behalf of the  
19 general public. Their right to know and their right to  
20 publish is neither more nor less than that of the  
general  
21 public. Indeed it is that of the general public for  
whom  
22 they are trustees".  
23

24 I went on to say: "In my view the role of the media in

25 relation to court reporting is not confined to ensuring  
26 that any matter broadcast or published material is fair  
and  
27 accurate and contemporaneous, but due administration of  
28 justice is itself a matter of public interest and hence  
a  
29 proper subject of fair comment by the media".

30 .  
31 In my opinion, all those primary facilities are  
available  
32 to the media when the transcript is published in the  
public

1 sittings of the Tribunal. The transcript is a verbatim  
2 report of everything that occurs in the private sitting,  
3 and all objections, including any complaint of  
irregularity  
4 or bias are duly noted and the transcript is duly  
certified  
5 as being a true and accurate record of the said  
6 proceedings.

7 .  
8 Any such objections are not dealt with by the  
Commissioner  
9 as such, but are dealt with in public in the public  
sitting  
10 of the Tribunal. So all facilities are present, so all  
11 the facilities of being present in court, and all the  
12 consequences of the press being present in court are  
duly  
13 protected; court or Tribunal I should, that should read.  
14 .

15           The Tribunal is master of its own procedures. I am  
firmly  
16           of the belief that procedure should be the servant and  
not  
17           the masters of justice.

18           .  
19           There are, however, particular reasons in this instance  
why  
20           I have opted for the commission to be held in private,  
21           apart from the precedent of the analogous proceedings  
22           conducted by a court of justice.

23           .  
24           As above indicated, circumstances giving rise to the  
taking  
25           of evidence on commission is due, these circumstances  
26           giving rise to the taking of evidence in commission is  
due  
27           to the fact of the physical infirmity and delicate  
health  
28           of Joseph Murphy.

29           .  
30           I have two objectives to fulfill.  
31           .  
32           The first is to ensure that his evidence is duly taken  
and

1           recorded at the first opportunity. The second  
objective  
2           is one of very considerable importance, it is that I  
should  
3           affect the health and comfort of the deponent as little  
as  
4           possible.

5 .

6 Evidence has been provided to the Tribunal by Mr. Joseph

7 Murphy's solicitor on affidavit of the views of Dr.

Curran,

8 who is his medical opinion, and he deposes to the fact

that

9 he has been such since July of 1992. In that affidavit

is

10 recorded details of Mr. Joseph Murphy's ailments.

Suffice

11 it to say they are serious and quite debilitating. Dr.

12 Curran in paragraph 11 says:

13 .

14 "However, even in such optimum conditions it is my firm

15 opinion that Mr. Joseph Murphy would be still exposed to

a

16 real risk and that the experience is still likely to

impose

17 considerable strain and stress upon him. In those

18 circumstances, I respectfully advise the Sole Member

that

19 his well-being requires, and I emphasise his "well-

being",

20 requires the commission be conducted with a minimum of

21 stress and strain, including that which might be induced

by

22 the presence, by the attendance of persons not essential

to

23 the conduct of the commission" .

24 .

25 In a subsequent medical report dated September 9, 1999,

he

26 states: "I am aware that he (Mr. Murphy Snr.) is

anxious

27 to give evidence on matters and issues arising from the

28 Tribunal which touch upon his good name and reputation.  
In  
29 particular he wishes to the best of his ability and  
recall  
30 to answer what he regards as inaccurate and damaging  
31 allegations which have been made about him personally  
and  
32 about the activities of his Irish companies by Mr. James  
  
1 Gogarty".  
2  
3 He continues: "I believe that the undertaking can be  
4 successfully accomplished if the Tribunal can so arrange  
it  
5 so as to reduce the stress and strain involved for Mr.  
6 Murphy to the barest minimum possible. I am aware,  
from  
7 my consultations, that he is deeply and genuinely  
anxious,  
8 because of the possibility that the occasion of his  
9 evidence would be attended by excessive publicity.  
This  
10 anxiety is increased by the fact that for many years he  
has  
11 lived in privacy... and in retirement in Guernsey which  
is  
12 a small island".  
13  
14 And here again I read with emphasise the opinion of Dr.  
15 Murphy. "It is my professional opinion that these two  
16 circumstances are a source of great anxiety to him, and  
17 would impose an intolerable strain and make his  
testimony a

18 somewhat parlous occasion for him. I respectfully  
advise  
19 that the Tribunal, the Tribunal, that the optimum  
20 conditions for Mr. Murphy's testimony should be with as  
few  
21 people present as circumstances will permit... If these  
22 conditions could be met I would advise that Mr. Murphy  
23 would be able to give evidence".  
24 .  
25 In my view, while under normal circumstances, I would be  
26 quite happy to make an exception from the general  
practice  
27 of hearings on commission in private and accommodate the  
28 press with whom in the course of my judicial career I  
have  
29 always had extremely good relations and for whom I have  
the  
30 very deepest respect for their integrity and  
31 professionalism.  
32 .

1 This is not a case in which I consider that I can take  
that  
2 liberty for two reasons: -  
3 (1) In the light -- sorry, I might, in the light of the  
4 medical evidence seriously effect the health of Mr.  
Joseph  
5 Murphy, and  
6 (2) Create a situation where, on medical advice, he  
would  
7 decline to give evidence. And his evidence would be  
lost  
8 to the Tribunal.

9 .

10 It should be remembered that Mr. Murphy is not within my

11 jurisdiction and is not a compellable witness by  
subpoena

12 or otherwise, it therefore behoves me not to take any  
risks

13 with his attendance to give evidence.

14 .

15 In the circumstances, notwithstanding the eloquent

16 submissions made by counsel on behalf of the media, I  
must

17 decline to permit their requests for attendance at the

18 taking of the evidence of this deponent on commission.

19 .

20 I may add, I shall endeavor in every way to make a

21 transcript available to them as soon as physically

22 possible.

23 .

24 I am satisfied that Section 2(A) of the Tribunals of

25 (Inquiry) Act 1921 gives me jurisdiction to take this

26 course of action and to exclude the public and therefore

27 the media as part of the public.

28 .

29 Having regard to the overriding public interest and  
having

30 the evidence taken and recorded, I am of the opinion in  
the

31 light of the medical evidence that it is in the public

32 interest expedient to exclude the public on the occasion

1 for reasons connected with the subject matter of the

2 inquiry and the nature of the evidence to be given.  
3 .  
4 I am satisfied that a full account of the proceedings  
will  
5 be published to the public at large, so the procedures  
6 which I have set out through the provision of a daily  
7 transcript of the evidence.

8 .  
9 That is the end of my decision.

10 .  
11 MR. NESBITT: Thank you, Mr. Chairman. I would like to  
12 thank you for giving the application such urgency.

13 .  
14 MR. SHIPSEY: I would like to join Mr. Nesbitt in that,  
15 sir.

16 .  
17 CHAIRMAN: Thank you both and each and every one of  
18 counsel who attended here for the assistance and very,  
very  
19 considerable assistance in my reaching this decision,  
20 because I can assure you it is not one I reached  
readily,  
21 and not without consideration.

22 .  
23 MR. SHIPSEY: May it please you, sir. In the event of  
24 instructions being given, my clients may wish to take  
the  
25 matter further. I would obviously request some  
assistance  
26 from your Registrar in ensuring that an order can be  
27 prepared so that such a step can be taken.

28

29

30

31  
appreciate32  
which1  
will

2

3

4  
circumstances.

5

6  
press.

7

8

9

10

11

CHAIRMAN: My Registrar will have available for you an order later in the afternoon and this transcript as you will appreciate -- this judgement as you will

has interlineations in it by virtue of, submissions

were made after it was thought over at lunchtime and I

have a clean copy made available as well when I -- I

couldn't publish it in its present condition, I have no

doubt you understand what happens in these

But within the hour a clean copy will be available to

anybody who wants it, including all members of the

MR. SHIPSEY: Thank you sir.

CHAIRMAN: Thank you very much.