

Tribunal of Inquiry into Certain Planning
Matters and Payments

Mr. Justice Flood
Sole Member

Applications by interested parties for an adjournment of a public sitting of this Tribunal of Inquiry on the 16th November 1998.

DECISION

Delivered on the 10th November 1998 at a public sitting of this Tribunal of Inquiry at The Printworks Building, Dublin Castle, Dublin 2.

This Tribunal of Inquiry publicly indicated its intention to sit in public and hear, in the presence of any interested persons and their lawyers, the evidence of James Gogarty, a person of 81 years of age, and any related evidence.

James Gogarty is a person who has been specifically named by the Oireachtas in the terms of reference establishing this Tribunal of Inquiry. This Tribunal is required under its mandate to inquire into definite matters of urgent public importance. James Gogarty has voluntarily provided to the Tribunal a sworn affidavit of the evidence he proposes to give at a public sitting of the Tribunal.

Following receipt of this affidavit, and having considered its contents in the context of the present preliminary confidential investigation being carried out by the Tribunal, the Tribunal decided that it was in the public interest and in the proper discharge of its mandate that the evidence of James Gogarty should be heard in public at an early opportunity. The factors which persuaded the Tribunal to adopt this course were Mr. Gogarty's age, his personal state of health, the importance of the matters contained in his affidavit and the proper public interest in adducing that evidence in public.

Consequent upon this decision all interested parties were furnished with a copy of James Gogarty's affidavit. These parties were also duly notified of the intention of the Tribunal to sit in public to hear that evidence.

The Tribunal then received correspondence from various interested parties seeking to have the public sitting to hear Mr. Gogarty's evidence adjourned. In an effort to put

a measure of coherence into some of these requests the Tribunal decided to hold a public sitting to hear applications for adjournment from any interested party. This public hearing took place on the 4th November 1998. This decision relates to the applications made at that public sitting.

There were applications by five interested parties, who have been granted limited representation before the Tribunal under the Tribunals of Inquiry (Evidence) Act, 1921, for an adjournment of the hearing in public of the evidence of James Gogarty.

The five interested parties were, in the order in which they made the applications, respectively:

1. Joseph Murphy Structural Engineering Ltd and a number of related companies and individuals,
2. Bovale Developments Ltd, Michael Bailey and Thomas Bailey,
3. Raphael Burke,
4. George Redmond, and
5. Gerard Downes.

There were a number of common features in each of these applications for an adjournment. In each case the applicant was represented by solicitor and counsel. In no case did any applicant adduce any evidence, or seek to adduce any evidence, in support of their respective applications. In consequence the applications were confined to submissions from counsel.

I propose to briefly outline what appear to the Tribunal to be the grounds of application advanced by each party.

Joseph Murphy Structural Engineers and others

Various grounds of application were advanced by these applicants. Those grounds included the submission that the time available to these applicants to prepare for a public sitting was too short having regard to the period of time to which the evidence intended to be adduced relates and their view that this evidence constituted "very serious charges" against these applicants "which amount to criminal offences".

These applicants have indicated their intention to adduce evidence before the Tribunal that is said to refute the evidence of Mr. Gogarty. The Tribunal is told by these applicants that they are at present assembling this evidence. This process of assembly and any related investigations by these applicants are said to be incomplete and cannot be completed in advance of the intended hearing. The Tribunal does not know what evidence these applicants seek to adduce at a public hearing.

These applicants complain that the Tribunal, in seeking to hear Mr. Gogarty's evidence in public at an early opportunity having regard to his age and state of health, has the effect of accommodating a particular witness unfairly as against their interests.

These applicants argue that they do not have adequate notice of what procedures are to be followed by the Tribunal when it intends to hear the evidence of Mr. Gogarty. This submission included an argument that

before Mr. Gogarty's evidence could be heard the Tribunal was required to adduce all appropriate evidence as to the "context" to which Mr. Gogarty's evidence would relate. Interestingly these applicants readily admit that they "are fully aware of these facts".

These applicants also request disclosure to them of information in the possession of the Tribunal relevant to the matters detailed in Mr. Gogarty's affidavit to the Tribunal. This submission was accompanied by an attempt to question the Tribunal and *in terrorem* threats of High Court proceedings.

These applicants further submitted that they were entitled to access to Mr. Gogarty's instructions to his own solicitors. The Tribunal was not informed if these applicants had ever requested this information from Mr. Gogarty, nor was the legal basis for this submission explained.

These applicants argue that it is essential for them to know what contacts the Tribunal has had with Mr. Gogarty, whether he was given an "immunity" by the Tribunal, and did the Tribunal agree with Mr. Gogarty that in return for a statement he would be called as the first witness and at an early date.

These applicants also sought to have, at this adjournment hearing, particular elements of Mr. Gogarty's sworn affidavit ruled inadmissible.

Finally, this application was supported by a reading of a variety of newspaper articles.

Bovale Developments Ltd and others

The Tribunal was required to hear the grounds of application of these applicants for an adjournment of the public hearing of Mr. Gogarty's evidence in a manner that should not have occurred. The pattern of unnecessary and pejorative remarks made in the course of that application and on behalf of these applicants does not, in the view of this Tribunal, assist the common interest of all interested parties in seeking to establish the truth of the definite matters of public importance identified by the Oireachtas.

A summary of what appear to be some of the material grounds of that application include:

- a. a claim that unspecified matters contained in Mr. Gogarty's sworn statement are ultra vires the terms of reference of this Tribunal,
- b. that the period of time available to prepare for the public hearing of Mr. Gogarty's evidence was too short,
- c. that the Tribunal had taken a period of eight days from the receipt of Mr. Gogarty's sworn statement to provide these applicants with notice of its contents,
- d. that the applicants required the disclosure to them of information in the possession of the Tribunal relevant to the matters detailed in Mr. Gogarty's sworn statement to the Tribunal,

- e. that these applicants do not understand the nature of the evidence to be heard at the proposed public sitting,
- f. that these applicants stand "accused" of "offences amounting to criminal offences",
- g. that a decision of the Supreme Court delivered on the 28th July 1998 concerning these applicants gives rise to "matters outstanding" which have the effect of preventing this Tribunal from commencing public hearings,

These applicants also adopted the grounds of application of Joseph Murphy Structural Engineers Ltd including the threat to take High Court proceedings and the grounds subsequently advanced by Raphael Burke.

Raphael Burke

The submissions of this applicant had a remarkable subtlety that required careful consideration. At the outset this applicant did not request any adjournment. This applicant initially appeared to indicate that, if he could be assured that the only evidence to be adduced concerning his interests was that contained in Mr. Gogarty's affidavit, then he for one would not apply for an adjournment.

This initial submission was then supplemented by a request that, if Mr. Gogarty's sworn statement did not represent the sum of the documentation and information in the possession of the Tribunal concerning this applicant's interests, then this applicant sought disclosure of that information before he could consider his position in relation to the Tribunal including the issue as to whether

or not he would apply for any adjournment of the public hearing of Mr. Gogarty's' evidence.

George Redmond

This applicant adopted many aspects of the submissions made by other interested parties in relation to his application for an adjournment. These included the essential grounds of application advanced by Raphael Burke. In making his application for an adjournment this applicant also placed specific emphasis on his own concern to obtain access to local authority files, to identify and locate particular witnesses, to prepare his response to what he has characterised as Mr. Gogarty's distinct allegations against him, and to afford the Tribunal an opportunity to consider his submissions on the terms of reference of the Tribunal.

Gerard Downes

This applicant adopted the submissions made by the previous applicants in support of his application for an adjournment. In addition this applicant submitted that he would personally be out of the jurisdiction and travelling to Kenya and Spain. This applicant emphasised his concern to be present at the public sitting when Mr. Gogarty gives his evidence so that he can properly instruct his legal representatives.

New circumstances

The Tribunal adjourned the giving of its decision on the applications by the five interested parties for an adjournment of the hearing in public of Mr. Gogarty's evidence to today in order to consider those submissions.

On the 6th of November 1998 the Chief State Solicitor, acting on behalf of An Garda Siochana, furnished to the Tribunal twenty-nine individual statements in relation to certain criminal investigations carried out by An Garda Siochana. These statements contain information material to the matters canvassed in the sworn statement of Mr. Gogarty. This information is also material to the interests of various persons including some of the interested parties who sought to adjourn the hearing of Mr. Gogarty's evidence.

The Chief State solicitor has informed the Tribunal that this information only came to light after An Garda Siochana had considered certain parts of Mr. Gogarty's sworn statement.

The Tribunal is satisfied that An Garda Siochana took all appropriate steps to bring this information to the notice of the Tribunal at the earliest opportunity.

This situation alone amounts to a serious change in the circumstances to be considered by the Tribunal and is one which the Tribunal must assume that the five applicants seeking an adjournment, in common with the Tribunal itself, were unaware.

In the absence of objection from any interested party, the Tribunal proposes to take this new development into account in considering the question of any adjournment.

Criteria for adjournment

In considering the five applications for an adjournment the Tribunal is required to have regard to a variety of factors including:

- a. the requirement of expedition placed on the Tribunal by the Oireachtas,
- b. the clear public interest in properly inquiring into the definite matters of public importance set out in the Tribunal's terms of reference, and
- c. the constitutional and legal rights of all interested persons whose personal interests may be affected by the work of the Tribunal.

Any decision as to whether or not to adjourn a public sitting must be based on a careful balancing of all relevant interests and their material circumstances.

The essence of the grounds of application before the Tribunal include arguments as to the right of the interested parties to constitutional fair procedures. The applicants say that before Mr. Gogarty's evidence may be heard in public by the Tribunal they are entitled to the following:

1. Prior notice of any allegation of which the Tribunal is aware relevant to their particular interest,
2. Prior notice of any documentation or information in the possession of the Tribunal relevant to their particular interest,

3. A reasonable period of time within which to consider any relevant allegation, documentation or information and to prepare for any public hearing of those matters.

Constitutional rights enjoyed by all citizens under our constitutional system of Government and, in consequence, must be fully respected by the Tribunal. Such rights are properly considered by the Courts to be a necessity, rather than a luxury, in this State.

The right to constitutional fair procedures in the context of the applications made by these five applicants does not have the effect that this Tribunal is prevented from discharging its mandate. The effect of some of the more extreme of the applicant's submissions would be to restrict the proper areas of inquiry of this Tribunal, or to have a model of procedure imposed on the work of the Tribunal which would frustrate this inquiry.

The time at which evidence is heard

The decision as to the time when the Tribunal should adduce evidence at a public sitting is a matter within the sole discretion of the Tribunal. The Tribunal has a duty to have regard to any relevant submissions in relation to such decision from interested parties, but such parties do not have a veto over the discretion of the Tribunal.

The early hearing of specific evidence

The submission that the evidence of a particular witness can only be heard at a time when all persons interested in that evidence are satisfied that all contextual evidence

has first been adduced and only when all investigations on any matter contained in the terms of reference are exhausted is rejected by the Tribunal. The suggestion that a failure to adopt this model of procedure constitutes a violation of the applicants' rights to fair procedures is also rejected. The Tribunals of Inquiry (Evidence) Acts 1921 to 1998 do not impose any particular model of practice and procedure on tribunals. This is not only a matter of law, it is also rudimentary common sense. The procedures appropriate to inquiring into a major accident or disaster are likely to be quite unsuited to an inquiry into the truth or otherwise of allegations which may suggest corruption.

The taking of evidence of a witness in public, in advance of a full hearing of a matter, is well established in Irish law. The criminal law has many situations where evidence of a particular witness is taken in Court on sworn deposition prior to a trial. The civil law is also replete with many similar examples including the taking of evidence on commission.

The Tribunal is not satisfied that the applicants have made out any reasonable factual or legal basis for the claim that Mr. Gogarty's evidence may only be heard at a time or in the manner that they suggest.

The Tribunal is persuaded by the facts of Mr. Gogarty's age and his personal state of health, together with the public interest in the Tribunal hearing his evidence in public that the balance of the requirements of constitutional justice has the result that, in these exceptional circumstances, this evidence should be heard as soon as possible even if that has the effect that this evidence is not heard in a more conventional sequence.

Threats of litigation

It is a feature of tribunals of inquiry that various parties consider that the quality of elements of their submissions are improved by threats of litigation. Any interested party, in common with every citizen in the State, has the right of recourse to the High Court. The Tribunal, in common with those citizens, is also bound by the law. Threats of litigation are not an appropriate consideration to be taken into account in these applications for an adjournment.

Adequate notice of evidence

The constitutional requirements of adequate notice includes having adequate time to consider any allegations, and any evidence to be adduced in support of those allegations, relevant to the particular interest of a specific person. This concept also includes the requirement to have adequate time to assemble relevant evidence and to instruct any legal representatives. The legal test as to the adequacy of a period of time is determined by a consideration by the Tribunal of what is reasonable in the particular circumstances. None of the applicants for an adjournment could suggest what period of adjournment they in fact sought with any reasonable degree of precision.

Disclosure of information

The Tribunal accepts that there is a general duty on it to disclose to an interested party any relevant documentation or information in its possession which may be material to that party's interest before the Tribunal. In certain instances this disclosure may be in redacted form where elements of that documentation or information are not relevant or where a recognised ground of privilege exists.

This requirement of disclosure does not permit interested parties free access to privileged documentation or information gathered by the Tribunal in the course of its investigative work.

Admissibility of evidence

The general rule adopted by this Tribunal, in common with the established practice of every court and tribunal in this State, is that the time at which arguments as to admissibility of evidence should be made is the time at which that evidence is sought to be adduced.

The Tribunal is not persuaded that the applicants have advanced any compelling argument that would justify this Tribunal in departing from this established practice.

The Supreme Court

Bovale Developments Ltd and Michael Bailey were parties to a decision delivered by the Supreme Court on the 28th July 1998 concerning this Tribunal. It was submitted to the Tribunal that this decision gave rise to "matters outstanding" which would prevent public sittings of this Tribunal. These matters were said to include discovery of information provided by two banks and the determination by the Supreme Court of the issue of legal costs. These arguments were not pursued with any degree of conviction by that applicant. The Tribunal does not accept that they are, in the circumstances, proper matters to take into account in an application to adjourn.

Conclusion

The Tribunal, having considered all the relevant circumstances, including the fact that An Garda Siochana have made available to the Tribunal substantial information that must be notified to certain of the interested parties, and taking into account the submissions of the interested parties, has decided as follows:

1. that it is in the public interest that the evidence of James Gogarty be heard in public at the earliest appropriate opportunity,
2. that it is in the public interest that the evidence of James Gogarty is heard in public in advance of the adducing of evidence in public of the context in which Mr. Gogarty's evidence arises,

3. that it is in the public interest that the evidence of James Gogarty is heard in public in advance of the Tribunal completing all its investigations in relation to the terms of reference of the Tribunal,
4. that in the interests of constitutional justice any interested party will be provided with any relevant documentation or information in the possession of the Tribunal which may be material to that party's interest before the Tribunal subject to any claim of privilege,
5. that all interested parties are to be afforded a further period of time within which to prepare for the hearing of Mr. Gogarty's evidence in public and
6. that the Tribunal will commence hearing the evidence of Mr. Gogarty on the 12th January 1999.

When Mr. Gogarty's affidavit was circulated, the parties to whom it was sent were requested on the 20th of October to have their statements of evidence submitted to the Tribunal by yesterday the 9th of November. With the exception of An Garda Siochana, none of these parties have yet submitted their statements although the Solicitors for the JMSE parties had indicated in correspondence on the 27th of October that they would endeavour to have their statements submitted to the Tribunal by that date. It is difficult to reconcile this failure with the professed intentions of the JMSE companies, Mr. Bailey/Bovale and Mr. Burke to co-operate with the Tribunal.

The obligation to apply fair procedures requires that all persons who may be adversely affected by the evidence of others at the Tribunal shall have sufficient notice of such matters as affect them. It follows that if parties fail to supply the statements sought from them in sufficient time prior to the hearing their entitlement to have evidence led on any matter which might adversely affect third parties will be limited.