



**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**

**Speaking Note for the Sole Member
25th February 1999**

Thursday 25th February 1999

**Speaking Note for the Sole Member
25th February 1999**

1. Background

This Tribunal is presently hearing evidence in public from Mr. James Gogarty, a person specifically named in the terms of reference of this Tribunal.

Mr. Gogarty has, in the course of giving evidence to the Tribunal, made various statements that materially affect the interests of Joseph Murphy Structural Engineers Ltd. and its related companies and persons (whom I shall refer to collectively as "JMSE").

At an early stage of this Tribunal JMSE sought, and were granted an order for limited representation before the Tribunal in relation to their interests.

JMSE and related companies and persons are properly interested persons to be represented before the Tribunal in relation to the evidence being presently adduced by Mr. James Gogarty.

The Tribunal has been, and continues to be, conscious of its duty to ensure fair procedures and respect for the constitutional rights of JMSE in common with all other interested persons before the Tribunal.

This does not mean that the Tribunal is required to take the "side" of any person in these proceedings. In fact, having regard to the inquisitorial nature of a Tribunal there are no "sides" in an inquiry. The sole function of a Tribunal is simply to inquire into the existence, or otherwise, of the facts relevant to its terms of reference and where

appropriate to make any recommendations thereon. The only facts upon which a Tribunal is entitled to rely are those which are established in evidence at a public sitting.

2. The Facts

In the course of yesterday's hearing before the Tribunal I rose following an exchange with Mr. Garrett Cooney S.C. so as to afford him the opportunity to apologise to the Tribunal.

At the relevant time Mr. Cooney was cross-examining Mr. Gogarty on the content of a document described as a draft affidavit or a draft statement. It transpired that this document was prepared by Mr. Gogarty's then solicitors Messrs Donnelly Neary Donnelly in August 1997. The document was not signed by Mr. Gogarty and he has stated in evidence that he never swore or signed it. Mr. Cooney wished to put to the witness an extract from this document personally to illustrate an apparent inconsistency between this document and the affidavit sworn by the witness on the 12th October 1998.

I made a ruling that this document should be put by Mr. Cooney to the witness in its correct context. Counsel for Mr. Gogarty having stated that the document was quite clearly a draft which was not signed by the witness.

Mr. Cooney maintained his entitlement to put the document to the witness on the basis and I quote "... *this affidavit is in the first person singular, this document is in the first person singular its "I" he refers to "I"*. Mr. Cooney went on to state and I quote "... *somebody may have actually typed it out for him but its plainly in his words, plainly in his words.*"

Following upon an intervention by Counsel to the Tribunal to clarify that the document was not a draft affidavit but rather a draft of a statement Mr. Cooney accused Counsel

to the Tribunal of attempting to sabotage that part of his cross-examination. I ruled that no person was seeking to sabotage the cross-examination by Mr. Cooney. In reply - Mr. Cooney stated *"It seems like it Mr. Chairman"*.

The Tribunal then invited Mr. Cooney to put to the witness the document concerned in its proper context. In reply Mr. Cooney stated *"please Mr. Chairman, Mr. Gallagher interrupts me, Mr. Callanan interrupts me"*. The Tribunal again invited Mr. Cooney to put the document concerned to the witness in the proper context. Mr. Cooney then, in strident tones, addressed the Tribunal as follows:

"Mr. Chairman what is going on here? Are you going to give us a chance to defend ourselves in this Tribunal?"

The clear inference from these remarks is that the Tribunal itself had wrongfully sought to interfere with the constitutionally protected right of JMSE to defend their interests before the Tribunal. This is not the case.

The Tribunal stated to Mr. Cooney that the content and manner of his remark to the Tribunal were both insulting and insolent. In response Mr. Cooney stated *"Its well justified Mr. Chairman by the"* Mr. Cooney did not complete his remark as the Tribunal forthwith adjourned so as to allow time to Mr. Cooney to apologise.

These are the material facts in relation to the request made by the Tribunal to Mr. Cooney for an apology for his remarks concerning this Tribunal.

3. Consequences

The remarks made by Mr. Cooney in their effect constitute a serious and direct challenge to the integrity of this Tribunal and, in consequence, if left unchallenged may

hinder the proper functioning and effectiveness of the Tribunal.

A Tribunal is not a court of law. This does not mean, however, that there is not a requirement for decorum and an appropriate respect for the procedures applicable in the Tribunal.

It is a regrettable fact that in advance of these remarks Mr. Cooney yet again saw fit to announce to the Tribunal an intention to apply to the High Court to judicially review this Tribunal. The Tribunal has already publicly indicated that in *terrorem* threats of High Court intervention will not be allowed to impede its work.

4. Courses of Action

There are two possible avenues open to the Tribunal. Firstly, it may attempt to ignore the import of the conduct and remarks of Mr. Cooney. In my view, this is not appropriate having regard to the necessity to preserve the integrity of the Tribunal and respect for its procedures. The only other option available to the Tribunal which in the circumstances would be effective is to indicate to Mr. Cooney that while the order for representation in relation to his clients is not being varied or discharged, the Tribunal in the absence of the appropriate apology from him will withdraw his personal right of audience before the Tribunal. This, of course, would not affect the right of audience of the two other remaining senior counsel and legal team appearing on behalf of JMSE.

This is not a decision the Tribunal would wish to make nor, indeed, is it one which would be made lightly, but nevertheless it is a regrettable fact that the Tribunal considers it necessary to consider whether or not Mr.

Cooney's continued right of audience in this Tribunal should be withdrawn.

I shall now rise for 10 minutes so as to allow the matter to be considered.

PART II

In the event that no adequate apology is offered.

I have noted Mr. Cooney's response to my most recent request with some regret. Mr. Cooney has had the opportunity since 12.45pm yesterday to tender an apology to the Tribunal in response to the requests made of him. In the absence of any response yesterday, the Tribunal was adjourned and the evidence of Mr. Gogarty postponed until today.

I have listened with care to what Mr. Cooney has said and I fully take into account the significance of the matters he has mentioned.

I am nevertheless driven to the conclusion that in order to maintain the integrity of the Tribunal I must order that Mr. Cooney's entitlement to address the Tribunal on behalf of his clients is withdrawn.

Mr. Herbert do you wish to continue with the cross-examination of Mr. Gogarty at this time or do you wish to postpone cross-examination in which case I shall invite Mr. Allen to commence his cross-examination on behalf of his clients?