



**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

DECISION ON SUBMISSIONS

OF

THE SOLE MEMBER
Mr. JUSTICE FEARGUS M. FLOOD

20th January 1999

DECISION

Sequence of evidence

The Tribunal decided to hear in public the evidence of Mr. James Gogarty at a time which does not coincide with the sequence in which the matters to which his evidence may relate arise in the terms of reference set out in the instrument of the Minister for the Environment and Local Government establishing this tribunal.

The reasons for this decision have been stated clearly and made known to all the interested person's concerned with the evidence of Mr. Gogarty. These reasons have also been stated by the Tribunal at a public sitting of the Tribunal.

Mr. Gogarty is a person who is of advanced years, being now 81 years of age. He does not enjoy a good standard of health but appears to be able to give oral evidence in public at this time. He may have evidence that is both relevant and material to particular areas in this public inquiry.

The Tribunal considers that, having regard to the subject matter of this inquiry, it is in the public interest that Mr. Gogarty's evidence should be heard in public. The Tribunal, in consequence, decided that the hearing of Mr. Gogarty's evidence should not be held over until a time in the public hearings when the sequence of the subject matter of the terms of reference reached the matters to which Mr. Gogarty's evidence may relate.

The Tribunal, in these circumstances, considers it to be a matter of plain common sense that Mr. Gogarty's evidence should be heard in public. That means that the Tribunal had to adduce this evidence at the earliest appropriate opportunity. The public hearing of that evidence has previously been adjourned to take

account of the constitutional rights and fair procedure requirements of all persons whose interests may be effected by that evidence. There is no mandatory legal requirement, having regard to the material circumstances of Mr. Gogarty, which dictates the sequence in which his evidence is to be heard. If Mr. Gogarty's evidence were not to be available to this Tribunal it does not require to be a genius to forecast the criticisms and comments the Tribunal would receive in that situation.

The Tribunal has a duty to the Oireachtas to be as effective as practicable in the discharge of its mandate. Put simply, the public interest lies in the Tribunal seeking to establish the truth, or otherwise, in public of the matters detailed in the terms of reference.

The Tribunal is master of its own procedures. There is no single inflexible model of procedure for a tribunal of inquiry. This Tribunal does not consider that the adversarial model of procedure is appropriate in this inquiry.

The Supreme Court in a line of recent cases has made clear that a tribunal of inquiry must respect the constitutional entitlement of all persons concerned with its work to have their own constitutional rights respected, and that plainly includes their right to fair procedures. The Tribunal fully accepts its duty to respect those constitutional rights.

The Tribunal does not accept, however, that its decision to hear Mr. Gogarty's evidence in public violates the constitutional rights of the interested persons who are concerned with Mr. Gogarty's evidence.

Opening

The Tribunal has decided not to require its leading counsel to make a comprehensive opening speech at this time detailing the circumstances that led to the establishment of this Tribunal, the issues of fact which have to be inquired into by the Tribunal, and a resume of all the evidence intended to be called before the Tribunal.

The reason for this decision is plain and clear. The evidence of Mr. Gogarty is simply being taken out of turn so as to ensure that that evidence, whatever its merit, is available for future consideration by the Tribunal.

The Tribunal, in due course, may adopt to the extent it considers appropriate some of the more traditional aspects of procedure in relation to the calling of evidence in public at a tribunal. It seems to me that the dicta of Mr. Justice O'Flaherty, in the Supreme Court, to the effect that 'matters of procedure are the servants rather than the masters of justice' is an appropriate consideration. I know of no constitutional requirement that says that a tribunal can only hear evidence in public when leading counsel to a tribunal has made a full opening. In addition the personal circumstances of Mr. Gogarty are such that his evidence should not be further delayed.

Disclosure of documentation

The Tribunal has circulated to the appropriate interested persons' copies of documentation in its possession that it considers may be relevant to the evidence that it believes Mr. Gogarty may give at this public hearing. These materials include documents that may be relevant to either matters of substance or

issues of credit. The fact that an interested person is in possession of this category of documentation does not relieve them of a requirement to satisfy the Tribunal that a particular document is relevant, admissible and probative before they seek to introduce that document into evidence whether in questioning a witness, or otherwise.

The Tribunal has also included in the disclosed materials other documentation that may possibly have relevance to either the substance or credit of any evidence that may be sought to be introduced in evidence by any witness or by an interested person. The Tribunal considers that much of the documentation in this second category may not be readily admissible in the absence of the person seeking to adduce that documentation having first established, to the satisfaction of the Tribunal, a credible basis for its introduction in evidence.

The general principle operated by the Tribunal in relation to documentation sought to be adduced in evidence at a public sitting is that all parties with an appropriate interest in that documentation must prior to the time at which it is sought to be adduced have been furnished with a copies of that documentation.

Confidentiality

This Tribunal, in common with other tribunals of inquiry, has received a wide variety of documentation and information in confidence from various persons. This information was received on a specific confidential basis that was published in the Tribunal's memorandum of confidentiality at the commencement of this inquiry.

Large amounts of that documentation and information contain confidential information that could not be relevant, admissible or probative in evidence at a public sitting of this Tribunal.

The Tribunal does not intend to entertain applications from any apparently interested person for what in effect would be a trawl of the files of this Tribunal under the guise of an application for disclosure of information. Firstly, the Tribunal has a continuing duty of confidence to the persons from whom it has received in confidence documentation or information that is not appropriate to be circulated to any interested person. Secondly, the Tribunal is the proper authority to decide what documentation or information is relevant, admissible and probative in its proceedings.

Applications for disclosure

Mr. Cooney, S.C. on behalf of Joseph Murphy Structural Engineering Limited and other related persons, Mr. Allen, S.C. on behalf of Bovale Developments Limited and their related persons, and Mr. Leonard, S.C. on behalf of Mr. Downes have made various applications to the Tribunal for disclosure to them of certain categories of confidential information in the possession of the Tribunal.

The first point to be made clear is that any document in the possession of the Tribunal that is to be adduced in the ordinary course of evidence at any proceedings of this Tribunal will be made available to any appropriately interested person. That is a requirement of constitutional fair procedures as contemplated by the Supreme Court in its recent decisions in this area.

By way of example, any documentation emanating from Mr. Gogarty, Messrs Donnelly Neary and Donnelly, solicitors, or Messrs Duffy Mangan and Butler, auctioneers in the possession of the Tribunal that is adduced in evidence has, or will, make available to those persons any documentation that is to be adduced in evidence. In certain instances some documentation is not yet in the possession of the Tribunal. Where that is the case the Tribunal will provide appropriate documentation to properly

interested persons if and when the Tribunal comes into possession of that documentation.

The Tribunal has disclosed, and will continue to disclose, to properly interested persons additional documentation in the possession of the Tribunal that may possibly have relevance to evidence that may be adduced in evidence. This category of documentation is considered by the Tribunal to be unlikely to be admissible, relevant or probative in the absence of a person satisfying the Tribunal that there is a credible justification for its introduction in evidence.

There is a third category of documentation in the possession of the Tribunal that it considers, in the absence of a persuasive justification to the contrary, should not be disclosed to particular persons concerned with this inquiry. In those circumstances that documentation continues to be confidential to the Tribunal.

Third category documentation

In certain instances where interested persons have sought disclosure to them of certain documentation that remains confidential to the Tribunal the Tribunal has refused to disclose that documentation unless a clear and compelling basis can be established by an interested party that they should be provided with any of this category of documentation.

In limited instances where certain interested persons have made out a clear and compelling case the legal representatives of such persons have been permitted to inspect specific confidential documentation under the strict supervision of the Tribunal at the Tribunal's offices. In each case this inspection has occurred only after the person who provided the documentation concerned agreed to a waiver of confidentiality limited to this purpose.

Subsequent to this strict inspection process the Tribunal has entertained, in private, requests from these interested persons for disclosure of limited elements of the documentation inspected. Where the Tribunal has not done so already the Tribunal will directly notify the interested persons concerned of the decision of the Tribunal in relation to these requests for additional disclosure in advance of the conclusion of Mr. Gogarty's direct evidence.

I should indicate that this aspect of the Tribunal's work has been considerably eased by the pragmatic approach of both Mr. Cooney and Mr. Allen in relation to the resolution of this matter.

Contact with Mr. Gogarty

Mr. Cooney's clients have sought disclosure from me personally as to whether I have had any meeting with Mr. Gogarty for the purpose of interviewing him, or otherwise, in relation to this inquiry. I am not satisfied that this was a proper matter of disclosure. I consider this type of request an attempt to seek improper access to the confidential preliminary investigative work of the Tribunal.

In view of the fact that this submission has been made I wish to make clear that I have not interviewed Mr. Gogarty at any time and I have entered into no agreements with him in relation to the subject matter of this inquiry.

I have met with Mr. Gogarty on one occasion. On the 12th January 1998 I attended at Mr. Gogarty's home in the presence of a tribunal counsel by appointment. My meeting with Mr. Gogarty was brief. At that meeting I explained to Mr. Gogarty that the Tribunal counsel would be seeking his co-operation in relation to this inquiry, and that the Tribunal was independent in the exercise of its functions.

Mr. Gogarty requested an order for representation before the Tribunal. I granted that application and confined the order to one of limited representation. Mr. Gogarty had no legal representation at that time and indicated that he wished to retain the firm of McCann Fitzgerald, solicitors, with whom he had previous dealings. I made clear to Mr. Gogarty that this order did not constitute an automatic entitlement to an award of legal costs by the Tribunal.

In my presence Mr. Gogarty expressed concerns for his personal safety. It was plain to me that these concerns, whatever their basis, were real to Mr. Gogarty.

In the circumstances of Mr. Gogarty's age, my understanding as to his condition of health, and the fact that he had no legal representation at that time I considered it appropriate that I should travel to his home to hear his application for representation.

Security provision

Mr. Cooney's clients have also sought disclosure in relation to the provision of security to Mr. Gogarty. Again, I am not satisfied that this was a proper matter of disclosure. Again, in view of the fact that this submission was made I repeat to Mr. Cooney's clients that I have not interviewed Mr. Gogarty and I did not enter into any arrangement with him.

Mr. Gogarty did express serious concerns for his personal safety to the Tribunal. The Tribunal did request the Garda Commissioner to make appropriate security provision for Mr. Gogarty and the Garda Commissioner did so. The Tribunal has previously disclosed to Mr. Cooney's clients confidential Garda Siochana documentation in relation to that matter. The Tribunal made the decision to request security independently of Mr.

Gogarty and An Garda Siochana with a view to having Mr. Gogarty's evidence available to the Tribunal.

Mr. Gogarty's evidence

The legal submissions canvassed in this decision were in support of various applications to defer Mr. Gogarty's direct evidence. On the 12th January 1999 I announced in public my decision to proceed to hear the evidence of Mr. Gogarty. At the time of that decision I was not satisfied that the legal submissions made to the Tribunal warranted the further deferral of Mr. Gogarty's evidence.

I was impressed by the argument of Mr. O'Reilly, S.C. who is instructed by the Attorney General to represent an aspect of the public interest before the Tribunal. Mr. O'Reilly emphasised to the Tribunal that it is in the public interest that the Tribunal should proceed as expeditiously as possible in its work and that it was a matter for the Tribunal itself to determine its own procedures.

Taking all matters into account I was not satisfied that it was appropriate to further delay the hearing of Mr. Gogarty's evidence.