



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

Appointed by Instrument of The Minister for the Environment  
and Local Government dated the 4<sup>th</sup> day of November 1997  
as amended by Instrument dated the 15<sup>th</sup> 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 15<sup>th</sup> March 1999**

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

At 10.45 a.m. on Wednesday the 9<sup>th</sup> of March 1999 the Tribunal received nineteen folders of documents from the Solicitors for Bovale Developments Limited, Michael Bailey and Thomas Bailey, nineteen folders of documents.

Later that day the Tribunal wrote to the Solicitors, Smith Foy & Partners, in the following terms, inter alia:-

*"As the Tribunal has just received three large boxes of documents from your clients, and as the questioning of Mr. Gogarty by your Counsel will commence the day after tomorrow – Thursday, 11<sup>th</sup> March 1999 – I have been directed by the Sole Member to ask you to identify, by return, all documents which your Counsel intends to put to Mr. Gogarty in the course of his examination. Your cooperation in this regard will facilitate the Tribunal in the hearing of Mr. Gogarty's evidence and will ensure that requests from Mr. Gogarty to seek legal advice on any document that may be "sprung" on him will be kept to a minimum.*

*In saying this it is not to be interpreted as implying that the Tribunal expects any such documents to be "sprung" on Mr. Gogarty; it is merely*

*signposting a procedure that is intended to be fair to all parties and designed to expedite the hearing of evidence at the Tribunal”.*

In their reply of the 10<sup>th</sup> of March 1999 (received by the Tribunal on the 11<sup>th</sup> of March 1999) Smith Foy & Partners they were extremely reluctant to identify individual documents which Counsel intends to put to Mr. Gogarty and went on to say as follows:-

*“...Counsel retained on behalf of this firm does not intend, at this stage, to refer to documents other than documents contained in Mr. Gogarty's own discovery; documents already opened to the Tribunal; or documents already produced to the Tribunal. Counsel will, of course, when opening such documents indicate the reference numbers of the document, and where same have already been opened to the Tribunal, will identify the relevant part of the transcript”.*

By letter of the 10<sup>th</sup> of March 1999 McCann Fitzgerald, Solicitors for James Gogarty, wrote to the Tribunal in the following terms:-

*“Arising out of the discovery made and to be made by the Baileys and/or Bovale Limited, we are instructed to arrange to make application to the Sole Member for the following ruling:-*

1. *That no document will be permitted to put to Mr. Gogarty unless that document has been included in the documentation furnished to the Tribunal and made available to Mr. Gogarty's legal advisors prior to the commencement of his cross-examination.*
2. *That if a document is put to Mr. Gogarty which he requires to consider, he will thereupon be afforded an opportunity (a) to consider the document and (b) to call for and consider any related documentation and (c) to consult with his legal advisors in relation to the document if he requires to do so.*

*The alternative to this is that no cross-examination takes place until discovery is completed and considered.*

*To a large extent this ruling is either encompassed by or builds upon the earlier ruling of the Sole Member on the 1<sup>st</sup> day of February 1999 with regard to cross-examination.*

*We are most anxious to have this matter determined in good time prior to the commencement of Mr. Gogarty's cross-examination by Counsel for the Baileys and Bovale Limited. This appears to us to be equally in the interests of the Baileys and Bovale Limited as it is in Mr. Gogarty's interests. Accordingly, we would respectfully therefore suggest that, assuming the cross examination of Mr. Gogarty is being adjourned to*

*Monday 15<sup>th</sup> March, this application, on notice to the Baileys and Bovale Limited, might be entertained on Friday 12 March or at any other time convenient to the Sole Member on Thursday 11 or Friday 12 March."*

On the 11<sup>th</sup> of March 1999 the Tribunal wrote to McCann Fitzgerald, Solicitors and to Smith Foy & Partners, Solicitors, as follows (inter alia) :-

*"The approach of the Sole Member to discovery is as set out by the Supreme Court in AIB v Ernst & Whinney (1993) 1IR in which O'Flaherty J. said, inter alia, as follows:-*

*"Discovery is but an instrument to advance the cause of justice. It should be availed of to give the parties a proper appraisal of the case and on occasion at least to remove some issues from the debate thus saving time and cost."*

*In that case Finlay C.J. said that the purpose of discovery:-*

*"...is to ensure as far as possible that the full facts concerning any matter in dispute before the Court are capable of being presented to the Court by the parties concerned so that justice on full information rather than on a limited or partial revelation of the facts arising in a particular action may be done."*

*In his ruling of the 1<sup>st</sup> February 1999 - Day 11- the Sole Member said as follows:-*

*".....I have read the statements of evidence submitted on behalf of these parties. The statements appear to fall far short of the detailed narrative statement 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 January 17<sup>th</sup> 1999, may, in certain circumstances, not be unreasonable.....*

*The rationale of a 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 it in relation to the evidence to be adduced.*

*I am obliged to ensure a 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 the 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 wrong doing 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 indeed in the legal sense, be unfair.....*

*I have decided the procedure which would be adopted at this stage would be as follows:*

- (1) .....*
- (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 by me to consider the matter and, at my discretion, and solely at my discretion, to take limited consultation with his lawyers".*

*Subject to considering any written submissions that you may wish to make or that may be made on behalf of Baileys/Bovale,*

*the preliminary views of the Sole Member in relation to the rulings sought in yours of the 10<sup>th</sup> instant are as follows:-*

- 1. Save for exceptional reasons, and with the express prior consent of the Sole Member, no document will be permitted to be put to Mr. Gogarty unless that document has been included in the documentation furnished to the Tribunal and made available to Mr. Gogarty's legal advisers prior to commencement of his cross-examination on Monday next.*
  
- 2. Where a document is put to Mr. Gogarty in the course of cross-examination and the Sole Member, having heard all relevant applications and submissions, is of the view that justice and fairness requires that Mr. Gogarty be given an opportunity:-*
  - (a) to consider such document and/or any other related document or documents, and/or*
  - (b) to consult with his legal advisers thereto,*

*then the Sole Member shall afford Mr. Gogarty such reasonable opportunity as is, in the opinion of the Sole Member, necessary*



*to ensure that "justice on full information rather than on a limited partial revelation of the facts ... may be done".*

*I would stress that the foregoing is but a preliminary view of the Sole Member which, subject to consideration of any written submissions, you or solicitors for the Baileys/Bovale submit to the Tribunal not later than mid-day tomorrow, Friday 12<sup>th</sup> March 1999, will be delivered as a ruling by the Sole Member at the commencement of the hearing on Monday next."*

By letter of the 12<sup>th</sup> of March 1999 Smith Foy & Partners wrote to the Tribunal in the following terms, inter alia:-

*"In response to your invitation to make submissions on the proposed ruling of the Sole Member, we would repeat our contention (more fully set out in our letter of the 10<sup>th</sup> instant) that our clients should not be required to indicate in advance the documents they intend to rely on in the course of the cross examination of Mr. James Gogarty; the element of surprise is an essential component of cross-examination.*

*We do not understand why our clients should be restricted to the use of documents which have been furnished to the Tribunal*

*when no such restriction was imposed on the cross-examination by JMSE Limited (and associated persons or companies).*

*An earlier application by Counsel for Mr. Gogarty for a ruling that no documents would be permitted to be put to Mr. Gogarty in cross-examination which had not been discovered or furnished (Day 8, p.2) was not acceded to by the Sole Member. We are at a loss to understand why our clients should now be treated differently.*

*Furthermore, Mr. Gogarty was allowed to give direct evidence while the issue of his discovery remained outstanding as is evident from the fact that he has only recently filed two supplemental Affidavits of Discovery.*

*In all the circumstances, we object to paragraph (1) of the proposed ruling.*

*Strictly without prejudice to the foregoing, we are prepared to indicate to the Tribunal that Counsel retained on behalf of this firm does not intend, at this stage, to refer to documents, other than documents contained in Mr. Gogarty's own discovery,*

*documents already opened to the Tribunal; or documents already produced to the Tribunal."*

I wish to make it clear that there is no question of Bovale Developments Limited, Thomas Bailey or Michael Bailey being treated differently from any other person. The fact is that they have produced a large volume of documents in the very recent past and I am satisfied that fairness of procedures requires that any witness, including Mr. Gogarty, would have a reasonable opportunity of considering any relevant document which has been produced or might in the future be produced by any party.

In relation to JMSE Limited and associated persons and companies it is of some significance that those companies and individuals had produced a number of documents to the Tribunal some time before the questioning of Mr. Gogarty by Mr. Cooney SC commenced and all such documents had been inspected by Mr Gogarty's legal advisors prior to the commencement of such cross-examination.

While it is true that two supplemental Affidavits of Discovery have been recently filed on behalf of Mr Gogarty, it is only fair to point out that Mr Gogarty produced voluminous documentation to the Tribunal many months ago and such documentation has been inspected by lawyers for JMSE and Bovale

Developments Limited. A comprehensive Affidavit of Discovery was delivered by Solicitors for Mr Gogarty on 13<sup>th</sup> day of January 1999 and the two supplemental affidavits referred to in the letter from Smith Foy & Partners, related to a small number of additional documents which had not been referred to in the original Affidavit of Discovery. With the consent of Mr Gogarty's Solicitors, these documents have been inspected by Solicitors for Bovale Developments Ltd and Michael and Thomas Bailey.

Having taken into account all relevant factors, including the submissions on behalf of Bovale Developments Limited, Michael Bailey and Thomas Bailey, my ruling in relation to the putting of documents to Mr. Gogarty in the course of his questioning by Mr. Allen S.C. is as follows:-

1. Save for exceptional reasons, and with my express prior consent, no document shall be put to Mr. Gogarty unless that document has been included in the documentation furnished to the Tribunal and made available for inspection by Mr. Gogarty's legal advisors before 10 a.m. today, Monday the 15<sup>th</sup> of March 1999.
2. Where Counsel puts the contents of a document to Mr. Gogarty in the course of cross-examination and, having heard any relevant applications and submissions, I am of the view that

justice and fairness requires that Mr. Gogarty be given an opportunity:

- (a) To consider such document and/or any other related document or documents and/or
- (b) To consult with his legal advisors in relation thereto,

then I shall afford Mr. Gogarty such reasonable opportunity as, in my opinion, is necessary to ensure fairness for all parties and to ensure that justice may be done as between them.

Dated 15<sup>th</sup> of March 1999

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Mr Justice Feergus M Flood

Sole Member of the Tribunal