Neutral Citation Number: [2006] IEHC 48

THE HIGH COURT

2005 No. 1018 JR

BETWEEN

FITZWILTON LIMITED, GOULDING LIMITED AND RENNICKS SIGN MANUFACTURING

APPLICANTS

AND

JUDGE ALAN MAHON, JUDGE MARY FAHERTY AND JUDGE GERALD KEYS MEMBERS OF THE TRIBUNAL OF INQUIRY INTO CERTAIN PLANNING MATTERS AND PAYMENTS

RESPONDENTS

Judgment of Miss Justice Laffoy delivered 16th February, 2006.

The substantive judicial review proceedings

1. The issues on this judicial review are primarily delimited by the order made on 21st September, 2005 by White J. In that order leave was given to the applicants to apply by way of application for judicial review for a declaration that the respondents have failed to comply with paragraph J(2) of the Tribunal's Amended Terms of Reference in relation to the holding of a public hearing in relation to the Fitzwilton £30,000 payment and that, accordingly, any such public hearing is *ultra vires* the respondents and in breach of the applicants' constitutional rights. The applicants were also given leave to apply for ancillary relief in the form of orders of Certiorari and Prohibition. Such leave was granted on the grounds set forth at paragraph E of the applicants' Statement grounding their application for judicial review.

2. The factual background to the proceedings is that the respondents are the members of the Tribunal of Inquiry into Certain Planning Matters and Payments (the Tribunal), which was established in 1997. Amongst the matters which the Tribunal has investigated since its establishment is what is described in the applicants' Statement as "a political contribution of IR£30,000 made to Fianna Fáil by the Fitzwilton Group in June, 1989 ('*the Fitzwilton £30,000 payment*')". The Tribunal first made inquiries in relation to the Fitzwilton £30,000 payment in April, 1998 and, as the applicant put it, has continued its inquiries sporadically since then. The applicants assert that they have at all times co-operated with the Tribunal's inquiries. By instrument dated 3rd December, 2004, executed on foot of a resolution passed by both Houses of the Oireachtas, the Terms of Reference of the Tribunal were amended by the addition of paragraph J. Paragraph J(2) provides:

> "The Tribunal shall, subject to the exercise of its discretion pursuant to paragraph J(6) hereunder, by 1 May, 2005 or such earlier date as the Tribunal shall decide, consider and decide upon such additional matters (being matters in addition to those set forth at J(1)(a) to (g) above and in respect of which the Tribunal has conducted or is in the course of conducting a preliminary investigation as of the date of the decision) that shall be proceeding to a public hearing and shall record that decision in writing and shall duly notify all parties affected by that decision at such time or times as the Tribunal considers appropriate."

3. On 28th April, 2005 the respondents executed a document entitled "List of additional matters pursuant to paragraph J2 of the Amended Terms of Reference passed by Resolution of the Houses of the Oireachtas, on 17th November, 2004". The text of the document which preceded the list proper set out certain decisions which the Tribunal might take in relation to a matter on the list. It further stated that decisions as to whether or not any matter listed should continue to undergo private inquiry, or should proceed to public inquiry, would continue to be subject to review by the Tribunal in accordance with its Terms of Reference (as amended). The list contained 47 matters including a matter designated "Fitzwilton/MMDS/payment to Ray Burke by Rennicks".

4. By letter dated 4th July, 2005, the Tribunal responded to a submission which had been made by the applicants on 30th September, 2003, which had sought a private hearing of the applicants' submissions, stating that the Tribunal had shortly thereafter considered the request and decided that it would be inappropriate. The letter of 4th July, 2005 went on to state that the Tribunal was then currently reviewing all information and documentation in its possession relating to the Fitzwilton £30,000 payment. Notification to interested parties as to how the Tribunal intended to proceed would be effected as soon as it was deemed appropriate by the Tribunal. By further letter dated 15th July, 2005, the Tribunal informed the applicants that public hearings in the Fitzwilton £30,000 payment module would commence on 21st September, 2005 and were expected to continue for a period of three to four weeks thereafter. On 13th September, 2005, the Tribunal furnished to the applicants' solicitors a copy of the decision dated 28th April, 2005 from which all of the 47 matters listed on the J2 list other than the Fitzwilton £30,000 payment were redacted, stating that all of the contents which had been redacted comprised a list of decisions taken by the Tribunal to go to public hearing in matters other than the Fitzwilton £30,000 payment.

5. Insofar as they are relevant for present purposes, the grounds on which the applicants were given leave to seek judicial review are the following:

> · That the J(2) List does not record in writing a decision by the Tribunal that the Fitzwilton £30,000 payment "shall be proceeding to a public hearing" and therefore does not comply with the mandatory requirements of paragraph J(2) of the Tribunal's Amended Terms of Reference (E(7)).
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> · That the Tribunal failed to –
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> - consider, adequately or at all, whether the Fitzwilton £30,000 payment "shall be proceeding" to a public hearing in the period between 3rd December, 2004 and 1st May, 2005, as required by paragraph J(2) and
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> - make a decision that it should within that period as required by paragraph J(2) (E(8)).
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> · That the J(2) List unlawfully purports to defer a decision as to whether or not to proceed to a public hearing in respect of the many matters apparently listed therein and/or to reserve to the Tribunal an ongoing discretion to make such decision in the future which is not contemplated or permitted by paragraph J(2), so that the Tribunal failed to exercise the power and/or discretion conferred by paragraph J(2) (E(9)).

6. The respondents' response to the foregoing grounds in their notice of opposition is as follows:

· In response to E(7) they refer to and explain the heading of the document of 28th April, 2005 and deny that the written record of the J(2) List does not record in writing a decision by the Tribunal that the Fitzwilton £30,000 payment "shall be proceeding to a public hearing" and does not comply with the requirements of paragraph J(2).

· In response to E(8) they deny that they failed to consider whether the Fitzwilton £30,000 payment "shall be proceeding" to a public hearing within the period between 3rd December, 2004 and 1st May, 2005 and they further deny that they failed to make that decision within the relevant period.

· In response to E(9) the respondents traverse the assertions made in that ground.

7. The respondents' statement of opposition is verified by an affidavit sworn on 29th September, 2005 by Dónall King, the solicitor to the Tribunal. In paragraph 18 Mr. King avers as to what he has been told by the Members of the Tribunal as to the creation of the J(2) List. The work of the Tribunal that was outstanding as of November, 2004 amounted to approximately 160 matters. In sub-paragraphs (e) to (g) Mr. King avers as to how the reduction to the 47 matters itemised in the J(2) List came about in the following terms:

> "(e) The members of the legal team provided the Members with relevant details relating to outstanding work within the period November, 2004 to April, 2005, so as to enable the Members fully and comprehensively consider a variety of factors relating to each matter, including, for example, (and only by way of example), the subject matter under inquiry, the extent of the private inquiry then underway, its likely length at public hearing, the availability of witnesses, its probative value, amongst other factors.
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> (f) Between November, 2004 and April, 2005, the Members received from their legal team reports and relevant information and documentation on the outstanding work. As these were received, the Members considered them and conferred among themselves in relation thereto and from time to time decided on matters which they considered should proceed to public hearing.
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> (g) At all times the Members were aware and conscious of the fact that their decision as to the additional matters for public hearing was required to be made on or before the first day of May, 2005. As that day approached they were compiling what was subsequently known as the 'J2 list'. The J2 list was typed on 28th April, 2005 and was then signed by each Member on this date. Prior to each of the matters being entered into the list, the Tribunal Members had considered each matter at various times between November, 2004 and April, 2005. As the Tribunal Members considered each matter and decided whether or not that matter should go to public hearing this review and decision-making process of necessity took a number of months given the number of outstanding matters. The 'Fitzwilton £30,000 payment' was one such matter that they decided in the course of this review should proceed to a public hearing. This 'J2 list' represents the record in writing of the decision in each matter, and having regard to the wording and intent of paragraph J2 of the Amended Terms of Reference, it does not have any other purpose."

8. Mr. King also addresses an averment contained in the applicants' grounding affidavit to the effect that, in the Tribunal's letter of 4th July, 2005, "the Solicitor to the Tribunal also advised (or so the applicants understood that letter at the time) that the respondents were in the process of formulating their decision on whether or not to proceed to conduct public hearings relating to the £30,000 payment in question", in paragraph 19 of his affidavit, denying the applicants' assertion and stating that the fact of the matter is that the Tribunal Members took the decision to proceed to conduct public hearings in relation to the Fitzwilton £30,000 payment prior to 1st May, 2005. He then goes on to explain the letter of 4th July, 2005 in paragraph 20 in the following terms:

> "The review referred to in the Tribunal's letter of 4th July, 2005 was not a review being conducted for the purpose of making a decision as to whether or not to go to a public hearing. This review was for the purposes of determining whether or not the proposed module was capable of being dealt with in public within a certain timeframe. To this end, it was necessary to review, once again, the documentation and information available to the Tribunal, to determine finally the witnesses required, and to seek any additional information or documentation deemed necessary to complete a Brief of documentation for circulation to interested parties.
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> Furthermore, it was necessary to review the documentation with due regard to the decisions of the High and Supreme Courts in the *O'Callaghan* case and which were available at that time."

This application: discovery

9. Against that factual background in the context of the substantive judicial review application, this is an application by the applicants seeking discovery of the following documents:

> (1) all documents prepared for and/or considered by the Tribunal in the period between 3rd December, 2004 and 1st May, 2005 for the purpose of considering and deciding in accordance with paragraph J(2) whether the Fitzwilton £30,000 payment module should proceed to a public hearing before the Tribunal;
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> (2) all documents relating to the purported decision of the Tribunal that the Fitzwilton £30,000 payment module would be proceeding to a public hearing before the Tribunal, including (but not limited to) all documents evidencing and/or recording that purported decision; and
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> (3) a full and complete copy of the J(2) List prepared by the Tribunal.

10. Discovery of the first and second categories of documents is sought in relation to the issues raised by ground E(8) and the denial thereof. Discovery of the J(2) List unredacted is sought in relation to the issue raised by ground E(9) and its denial by the respondents.

The applicants' submissions on legal principles applicable

11. The applicant submitted that applications for discovery in judicial review proceedings are not subject to any different principles to those applicable in other proceedings, citing the decision of Ó Caoimh J. in *Shortt v. Dublin City Council* [2003] 2 I.R. 69. Therefore, they submitted that the ordinary principles applicable to discovery in general, which were most recently set out by the Supreme Court in *Ryanair Limited v. Aer Rianta* [2003] 4 I.R. 264, are applicable on this application. However, counsel for the applicants drew the court's attention to the dictum of Sir John Donaldson M.R. in *R. v. Lancashire C.C.* [1986] 2 All E.R. 941, as to the role of a public

body responding to an application for judicial review. Apropos of a submission made in that case by counsel for the respondent authority that it was for the applicant to make out his case for judicial review and that it was not for the respondent authority to do it for him, the Master of the Rolls stated that, in his judgment, that was only partially correct continuing (at p. 945):

> "Certainly it is for the applicant to satisfy the court of his entitlement to judicial review and for the respondents to resist his application, if he considers it to be unjustified. But it is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands."

12. At the end of his judgment the Master of the Rolls expressed agreement with Parker L.J. that the grant of leave to apply for judicial review does not constitute a licence to fish for new and hitherto unperceived grounds of complaint. Parker L.J., in a passage (at p. 947), which was relied on by both counsel for the applicants and counsel for the respondents, counsel for the respondents emphasising the words in italics in the original, stated as follows:

> "In the vast majority of cases authorities whose decisions are challenged will no doubt put before the court all that is necessary to enable justice to be done, for I agree that they have, or should have, a common interest with the courts in ensuring that the highest standards of administration are maintained and that, if error has occurred, it should be corrected. I agree, therefore, that when challenged they should set out fully what they did and why, *so far as is necessary, fully and fairly to meet the challenge.*

13. In so doing they will, in my view, be making full and fair disclosure and putting the cards face upwards on the table as referred to by Sir John Donaldson M.R. I express my views in a rather more restricted way, for I would not wish it to be thought that once and applicant has obtained leave he is entitled to demand from the authority a detailed account of every step in the process of reaching the challenged decision in the hope that something will be revealed which will enable him to advance some argument which has not previously occurred to him."

14. The applicants also relied on the observations of McCarthy J. in his concurring judgment in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 under the heading "the burden of proof" (at p. 79) in the following terms:

> "An applicant for judicial review of an administrative decision must, so far as reasonably possible, identify and prove in evidence the material upon which the decision was made. He may call in aid the procedural weapons of discovery of documents and interrogatories. In advance of application for leave to apply for judicial review, he should seek disclosure of all such material."

The respondents' submissions on legal principles applicable

15. The respondents advanced two distinct arguments in response to the application for discovery. The first was that the applicants' application fails to meet well-established criteria for discovery. The respondents did not contend that different principles apply to the obligation to make discovery in judicial review proceedings and in other civil proceedings. What they contended was that, as a matter of general application, a court will not allow the discovery process to be used as a "fishing expedition". A bare assertion unsupported by evidence is not sufficient to ground an application for discovery. They cited English and Irish authorities for those propositions: the decision of the English Court of Appeal, unreported, of 24th July, 1994 *in R v. Secretary of State for Health, ex parte London Borough of Hackney*; the decision of this court (Ó Caoimh J.) in *Shortt v. Dublin City Council*; the decision of the Supreme Court (unreported, 10th July, 2000) in *Aquatechnologie Ltd. v. National Standards Authority of Ireland*; and the decision of the Court of Criminal Appeal unreported, 8th August, 2003) in *D.P.P. v. Gilligan*.

16. The respondents' second argument was that the discovery sought is an impermissible invasion of the Tribunal's decision-making process. The respondents base this argument on s. 4 of the Tribunals of Inquiry (Evidence) Act, 1921 (the Act of 1921) which provides as follows:

> "A Tribunal may make such order as it considers necessary for the purposes of its functions, and it shall have, in relation to their making, all such powers, rights and privileges as are vested in the High Court or a judge of that court in respect of the making of orders."

17. It was submitted that it has been settled law since *Knowles Trial* [1692] 12 Howell's State Trials 1167 that judges cannot be compelled to answer as to the manner in which they have exercised their judicial powers. It was submitted that this principle, which rests on the fundamental principle of judicial independence, is not confined to judges and extends to a variety of administrative tribunals where the detail of discussion and the manner by which the decision is reached ought normally to remain confidential. A number of authorities were cited in support of this proposition: the decision of the Judicial Committee of the Privy Council in *Roylance v. General Medical Council* [1999] 3 W.L.R. 541; three decisions of the High Court of Australia entitled H*erijanto v. Refugee Review Tribunal* of 31st March, 2000, 17th April, 2000 and 8th September, 2000, reported respectively at 170 A.L.R. 379, 575 and [2000] H.C.A. 49; the decision of the High Court of Australia (the Full Court) in *Muin v. Refugee Review Tribunal* [2002] 190 A.L.R. 601; and the decision of the English Court of Appeal (unreported, 4th December, 1998) in *Parker v. The Law Society*.

The authorities

18. In my view, the recent Irish authorities clearly establish that the same principles apply to discovery in judicial review proceedings as apply generally in civil proceedings, although, primarily by reason of the nature of the process, the relief afforded and the issues which arise in judicial review proceedings, the practical application of the principles may result in discovery being less frequently ordered in judicial review proceedings than in other civil proceedings. Why this is so is apparent from the most recent Irish authority cited by the parties.

19. The earliest of the recent Irish authorities cited is the decision of the Supreme Court in the *Aquatechnologie* case. In that case, the plaintiff sought to judicially review a decision of the National Standards Authority of Ireland, acting through a sub-committee, not to issue a certificate of *agrément* in respect of a product, thermoplastic piping, imported by Aquatechnologie. Murray J., delivering the judgment of the Supreme Court, stated that an applicant is not entitled to discovery based on mere speculation or on the basis of what has been traditionally characterised as a fishing expedition. It is clear from his judgment that he applied the criteria generally applied, and mandated by Order 31 of the Rules of the Superior Courts, 1986, in determining applications for discovery, relevance and what is necessary for either disposing fairly of the cause or matter or for saving costs, on the appeal.

20. In *Shortt v. Dublin City Council*, Ó Caoimh J. stated (at p. 89) that, while the remedy of discovery is available in judicial review proceedings, the fact that discovery is rare in such proceedings does not relate to any restriction in the right to apply for the same in judicial review proceedings, but relates to the fact that its necessity will be more difficult to establish in judicial review proceedings

having regard to their nature. He approved of the approach adopted by the Court of Appeal in Northern Ireland in *Re Rooney's Application* [1995] N.I. 398, stating:

> "I am inclined to accept the general tenor of the persuasive authority of the Court of Appeal in Northern Ireland in *Re Rooney's Application* … and in this regard I am satisfied, having regard to the nature of judicial review proceedings and in particular the onus that lies on an applicant at the leave stage to furnish to the court evidence supporting the grounds advanced, that, in the absence of material suggesting that the averments in the affidavits filed on behalf of the respondent are untrue, to direct discovery of documents in circumstances where they can only be sought to impugn the integrity of the deponent would, in general, be oppressive."

21. The most recent decision on the topic of discovery in judicial review referred to in the submissions is the decision of the Supreme Court in *Carlow Kilkenny Radio Limited v. Broadcasting Commission* [2003] 528. The applicants in that case, who had been unsuccessful applicants in a competition held by the respondent to award a franchise to radio broadcasters in Counties Carlow, Kilkenny and Kildare, had been granted leave to seek relief by way of judicial review. They sought discovery in relation to thirteen categories of documents and at first instance were refused in relation to eleven categories, which included documents in relation to the respondent's decisions, reasons for the decisions, meetings held by the executive of the respondent in respect of awarding the licences, written submissions and confidential appendices to all applications for licenses and the criteria used to assess the applications. The judgment of the Supreme Court dismissing the appeal was delivered by Geoghegan J. He quoted the following passage from the judgment of Sir Thomas Bingham M.R. in *R v. Secretary of State for Health ex p. Hackney London Borough Council*, characterising it as a statement of principle which is easily recognisable in this jurisdiction and would seem to represent Irish law clearly at p. 534:

> "The basic approach is that discovery and production will be ordered in judicial review proceedings where they are necessary for disposing fairly of the application but not otherwise. The rules themselves provide no guidance as to when discovery should be treated as necessary for disposing fairly of an action or application, but over the years a practice has developed, the broad principles of which are clearly understood, even if the application of those principles inevitably gives rise to controversy in individual cases. It is undesirable to attempt any precise definition of the existing practice, but I think it is broadly true to say that discovery will be regarded as necessary for disposing fairly of the action, or application, if a party raises a factual issue of sufficient substance to lead the court to conclude that it may, or will, be unable to try the issue fairly, fairly that is to all parties, without discovery of documents bearing on the issue one way or the other.
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> In the ordinary *inter partes* civil action the plaintiff usually makes a series of factual averments which may well be challenged, but which are not usually sufficiently plausible to raise issues calling for discovery. It is not open to the plaintiff in a civil action, or to an applicant for judicial review, to make a series of bare unsubstantiated assertions and then call for discovery of documents by the other side in the hope that there may exist documents which will give colour to the assertions that the applicant, or the plaintiff, is otherwise unable to begin to substantiate. This is the proscribed activity usually described as 'fishing': the lowering of a line into the other side's waters in the hope that the net may enclose a multitude of fishes, the existence or significance of which the applicant has no rational reason to suspect."

22. Later, at p. 537, Geoghegan J. instanced situations in which discovery is not necessary in judicial review in the following passage:

> "The established English and Northern Irish jurisprudence, which would seem to be in conformity with our own principles of discovery, is to the effect that discovery will not normally be regarded as necessary if the judicial review application is based on procedural impropriety as ordinarily that can be established without the benefit of discovery. Likewise, if the application for judicial review is on the basis that the decision being impugned was a wholly unreasonable one in the *Wednesbury* sense, discovery will again not normally be necessary because if the decision is clearly wrong it is not necessary to ascertain how it was arrived at. Where discovery will be necessary is where there is a clear factual dispute on the affidavits that would have to be resolved in order to properly adjudicate on the application or where there is *prima facie* evidence to the effect, either that a document which ought to have been before the deciding body was not before it or that a document which ought not to have been before the deciding body was before it."

23. Geoghegan J. distinguished the comments in the judgment of McCarthy J. in *O'Keeffe v. An Bord Pleanála*, to which I have referred, as *obiter dicta*.

24. In relation to the facts of that case, in a passage which was emphasised by counsel for the applicants, Geoghegan J. remarked that the respondent in that case had been "entirely up front" in disclosing both its procedures and the documentation which was before it, apart from confidential information which each applicant was entitled to give. He also remarked that there was nothing to indicate either the giving of false information or the improper withholding of information that might justify discovery, nor was there any relevant conflict of fact on the affidavits that would justify it.

25. What clearly emerges from a review of the recent Irish cases is that, where discovery is sought in judicial review proceedings, the determinant as to whether discovery will be ordered in many cases is whether it is necessary having regard to the ground on which the application is founded or the state of the evidence.

Application of the legal principles

26. In relation to the first and second categories of documents sought by the applicants, the crucial question on this application is whether discovery is necessary to fairly dispose of the issues raised on the pleadings having regard to what is fair to each side.

27. The applicants commented on the fact that no material whatever is exhibited by Mr. King in his verifying affidavit, suggesting that this falls short of the duty of fair disclosure recognised in the authorities and that in this respect this case is distinguishable on the facts from the *Carlow Killkenny Radio Limited* case. In particular, they commented on the fact that no minute or other documentary record of the decision is exhibited by Mr. King, and that he is wholly silent as to when the decision was made or the circumstances in which it was made, save for asserting that the decision was made before 1st May, 2005. I do not accept that comment as being factually correct: in the last sentence of sub-paragraph (g) of paragraph 18 quoted earlier, Mr. King averred that the J(2) List represents the record in writing of the decision in each matter. Further, the applicants commented that the same evasiveness is to be found in the correspondence between the solicitors for the applicants and the Tribunal exhibited in the affidavit grounding the application for judicial review. In summary, the applicants submitted that the documents sought are necessary within the meaning of Order 31, in that there is no alternative means of obtaining them and the issues to which they relate cannot properly be resolved without their disclosure.

28. The respondents characterised the application as a textbook example of a fishing expedition. It was submitted that the important

consideration for the court is whether the applicants have made out a case on the issues which goes beyond a bald assertion. In relation to the applicants' assertion that a permissible inference to be drawn from the letter of 4th July, 2005 is that the Tribunal had not discharged its obligations in accordance with paragraph J(2), counsel for the respondents submitted that the letter was the only possible evidence advanced by the applicants as supporting their assertions. In relation to that letter, counsel for the respondents submitted that –

> (a) at worst, it is open to two constructions,
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> (b) Mr. King in his affidavit has explained what was intended, which imposed on the applicants the burden of establishing that the respondents authorised their solicitor to swear to something untrue and to mislead the court, which they had not discharged, and
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> (c) in any event, on the evidence of a letter of 20th July, 2005 from the applicants' solicitors to the Tribunal, the applicants put a different construction on the letter when they received it than they advanced in the grounding affidavit.

29. In my view, the answer to the crucial question is that discovery of the first and second categories is not necessary to fairly dispose of the issues. In setting out the reasons for that conclusion I respectfully adopt the terminology used by Geoghegan J. in the *Carlow Kilkenny Radio Limited* case. First, there is no clear factual dispute on the affidavits that would have to be resolved in order to properly adjudicate on the issues. Secondly, there is nothing to indicate either the giving of false information or the improper withholding of information on the part of the respondents which might justify discovery. Thirdly, there is no evidence whatsoever to the effect, either that a document which ought to have been before the Tribunal was not before it or that a document which ought not to have been before the Tribunal was before it. In this connection, in my view, a point made by counsel for the respondents, on which I did not understand the applicants to demur, is significant: the substantive application turns on the interpretation of the Tribunal's terms of reference in relation to the procedural obligations imposed on the Tribunal in paragraph J of the Amended Terms of Reference, not in relation to the scope of the matters which the Tribunal is competent to inquire into.

30. In relation to the application for discovery of the J(2) List in its complete unredacted form, in my view, the question of relevance has to be addressed.

31. The applicants submitted that the identity and nature of the 46 redacted matters is highly relevant to the issues on the substantive application and, in particular, the issues raised in ground E(9). It was submitted that the applicants could not effectively prosecute their claim and the court could not properly adjudicate on the issues in the proceedings in ignorance of the 46 matters.

32. The position of the respondents was that the applicants have been furnished with all of the relevant information on the J(2) List which relates to them. It was submitted that knowledge of other unrelated decisions of the Tribunal will not assist in furthering the applicants' substantive application.

33. In my view, applying the *Peruvian Guano* test of relevance as restated by the Supreme Court in the *Ryanair* case – that a document is relevant, which not only would be evidence upon any issue but also which, it is reasonable to suppose, contains information which may, not which must, either directly or indirectly, enable the party requiring discovery either to advance his own case or to damage the case of his adversary – the applicant has not established that the J(2) List in its complete unredacted form is relevant to the issues on the substantive application. I cannot see how the decision of the Tribunal to include a matter wholly unrelated to the applicants on the J(2) List could be material in relation to the manner in which the Tribunal made its decision to include the Fitzwilton £30,000 payment on that list or the decision itself or could elucidate the import of the entire document and, in particular, the deferral of a decision or the reservation of a discretion in relation to any matter listed. My conclusion on this aspect of the application is not in any way informed by the confidential nature of the J(2) List. If the J(2) List in its unredacted form were relevant, a mechanism could be put in place to preserve confidentiality.

34. In view of the conclusions I have reached, it is unnecessary to express any view on the respondents' alternative argument based on s. 4 of the Act of 1921, and I express none.

Decision

35. The applicants' application is dismissed.