Neutral Citation Number: [2012] IEHC 199

THE HIGH COURT

RECORD No. 2011/605 JR

BETWEEN

OLIVER BARRY

APPLICANT

AND

MR. JUSTICE FEARGUS FLOOD, HIS HONOUR JUDGE ALAN MAHON, HER HONOUR JUDGE MARY FAHERTY AND HIS HONOUR JUDGE GERALD KEYES IRELAND AND THE ATTORNEY GENERAL

RESPONDENT'S

THE HIGH COURT

RECORD No. 2011/5073 P

BETWEEN

OLIVER BARRY

APPLICANT

AND

HIS HONOUR JUDGE ALAN MAHON, HER HONOUR JUDGE MARY FAHERTY AND HIS HONOUR JUDGE GERALD KEYES

RESPONDENT'S

Judgment of Mr. Justice Hedigan delivered the 22nd of May of 2012

1. The applicant resides at Hollystown Golf Club, Hollystown, Dublin 15. The respondent is the Tribunal of Inquiry established on 7th October, 1997, by Ministerial Order, to inquire urgently into and report to the Clerk of the Dáil, in relation to certain planning matters and payments matters of urgent public importance.

2. The respondent in this application seeks the following reliefs:-

> 1. An Order to set aside the leave granted herein (and/or part thereof) on the 18th July, 2011.
>
> 2. An Order to set aside the said leave on the basis that the Applicant did not make a full and frank disclosure of all the material matters at the *ex parte* application for leave to apply for judicial review.
>
> 3. An Order to set aside the leave granted as the proceedings and reliefs claimed are out of time and I or are an abuse of process and/ or are frivolous and vexatious.
>
> 4. An Order pursuant to the inherent jurisdiction of the Court to set aside the said leave granted in the interests of justice and I or in the public interest.
>
> 5. An order determining this application as a linked application to the Judicial Review list with the Second to fourth named respondents Notice of Motion seeking similar relief in proceedings entitled the High Court Record No 2011 No. 5073 P between Oliver Barry applicant and Judge Alan P Mahon, Judge Mary Flaherty and Judge Gerald B Keyes being the Tribunal of Inquiry into Certain Planning Matters and Payments otherwise being plenary proceedings originally returnable in the Chancery List.

Background Facts

3.1 This motion dated the 29th July, 2011 is brought by the respondents seeking to set aside the *ex parte* leave granted by Peart J. on the 18 July, 2011. The respondent seeks to set aside the proceedings on the basis first, that the applicant did not make full and frank disclosure of material matters at the leave application, second that the reliefs claimed are out of time pursuant to Order 84 r 21(1) of the Rules of the Superior Courts, third the proceedings are an abuse of process and I or are frivolous and vexatious and should be set aside in the interests of justice and I or in the public interest. This motion is linked with earlier plenary proceedings dated the 12th July, 2011, in which the plaintiff (the applicant herein) sought identical reliefs regarding an order of *certiorari* quashing a decision made on the 7th March, 2011 by Judge Alan P. Mahon, refusing to vacate an earlier costs ruling dated the 15th October, 2004. The defendants in the plenary proceedings seek an order to dismiss the plaintiff's claim on the grounds of inordinate and inexcusable delay, want of prosecution and I or in the public interest. Mr. Justice Flood and the three Circuit Court judges who are the present members of the Tribunal of Inquiry into Certain Planning Matters and Payments *("the Planning Tribunal")* are sued as respondents in the judicial review proceedings. Only the present members of the Planning Tribunal are joined in the plenary proceedings.

3.2 The applicant seeks the following relief's in the judicial review proceedings:

(a) An Order of *Certiorari* quashing the decision of the second named respondent made on the 7th March, 2011 whereby the respondent declined to vacate the Order made by the said respondent as Chairman of the Planning Tribunal on the 15th October, 2004 refusing the applicant his costs;

(b) If *Certiorari* is granted :-

(i) the applicant seeks a declaration that the findings made by the first named respondent in the Second Interim Report published on the 26th September, 2002 were made *ultra vires* and in breach of fair procedures.

(ii) A Declaration that the decision of the respondent refusing the applicant his costs was *ultra vires* and in breach of fair procedures.

(iii) A Declaration that section 6(1) of the Tribunals of Inquiry (Evidence) Amendment Act 1979, as amended by section 3 of the Tribunals of Inquiry (Evidence) Amendment Act 1997 is unconstitutional.

(iv) A Declaration that the applicant is entitled to costs as claimed.

(c) Damages.

(d) If necessary an extension of time to bring the within proceedings.

(e) An Order that the proceedings be determined by plenary hearing.

3.3 The chronology of relevant dates starts on the 26th September, 2002 when the Second Interim Report of the Planning Tribunal issued. It found that the applicant made a corrupt payment of £35,000 to Mr. Ray Burke, Minister for Communications in May 1989. On the 15th October, 2004 the second named respondent refused the applicant his costs before the Tribunal on the basis of a finding of obstruction and hindrance having been made in respect of the applicant. On the 21st April, 2010 the Supreme Court in *Murphy v Flood and Ors* [2010] IESC 21 held that the Tribunal acted *ultra vires* in (i) Making a finding of obstruction and hindrance against the applicant therein (2) basing the costs refusal decision on that finding and on the substantive findings of the Second Interim Report. The Supreme Court quashed the Tribunal's decision to refuse the plaintiffs their costs and granted a declaration that the Tribunal was not entitled to make findings of obstruction and hindrance in respect of the plaintiffs. Subsequent to the above Murphy decision the applicants wrote to the respondents on the 22nd July and asked them to reconsider their costs refusal decision. The respondent invited the applicant to make legal submissions. The applicant did so. On the 7th March, 2011 the respondent refused to reconsider the applicants cost's application and to vacate the earlier costs order of the 15th October, 2004. On the 7th of June, 2011 the applicant issued a plenary summons. This summons issued 6 years and eight months after the initial costs decision of the 15th October, 2004 and 3 months after the above decision declining to vacate the costs order of 2004. On the 13th June, 2011 an appearance was entered to the Plenary Summons. On the 12th July, 2011 the respondents issued a motion to dismiss the Plenary Proceedings for delay and want of prosecution. On the 18th July, 2011 Peart J. granted leave *ex parte* to challenge in Judicial Review the decision of the respondent of the 7th March, 2011. This leave was granted 6 years 9 months after the Costs decision dated 15 October 2004 and 4 months after the decision declining to vacate the Costs Order.

Respondents Submissions

4.1 The jurisdiction to set aside leave is outlined by the Supreme Court in its judgment in *Adam and Iordache v The Minister for Justice* [2001] 3 IR 53 McGuinness J noted the general jurisdiction to set aside an *ex parte* order, citing McCracken J. in *Voluntary Purchasing v. Insurco Limited* [1995] 2 I.L.R.M 145, to the following effect at 68-69:-

> "In my view, however, quite apart from the provisions of any rules or statute, there is an inherent jurisdiction in the courts in the absence of an express statutory provision to the contrary, to set aside an order made *ex parte* on the application of any party affected by that order. An *ex parte* order is made by a judge who has only heard one party to the proceedings. He may not have had the full facts before him or he may even have been misled, although I should make it clear that that is not suggested in the present case. However, in the interests of justice it is essential that *an ex parte* order may be reviewed and an opportunity given to the parties affected by it to present their side of the case or to correct errors in the original evidence or submissions before the court. It would be quite unjust that an order could be made against the party in its absence and without notice to it which could not be reviewed on the application of the party affected."

4.2 While in one respect the applicant is within time in a technical sense in seeking an order of *certiorari* quashing the refusal of the second named respondent dated the 7th March, 2011 to revisit his decision taken on the 15th October, 2004 refusing the applicant his costs, the targets of the judicial review relief sought are long concluded transactions dating back almost nine and seven years respectively so far as the Planning Tribunal's Second Interim Report and its costs decisions are concerned. It dates back over 22 years to the Tribunal's finding of a corrupt payment to Mr. Ray Burke made in May 1989 which the applicant now wants to challenge. In addition, if *certiorari* is granted, the applicant wants to revisit the long published Second Interim Report of the Planning Tribunal dated the 26th September, 2002 regarding certain findings in that report including the finding that the applicant made a corrupt payment to the then Minister for Communications. Both the Second Interim Report and the costs decisions from the Planning Tribunal's prospect are regarded as long closed. They represent final determinations by the Planning Tribunal within the applicable legislation. In the language of *A v Governor of Arbour Hill Prison* [2006] 4 IR 88 at paragraph 244 they each represent "... a past or closed legal dealing, process or transaction". The respondent submits the applicant is patently outside the time limits provided under Order 84 r 21 in relation to each of the declaratory reliefs claimed. The fact that the applicant is within time to review the decision of the 7th March, 2011 does not *ipso facto* give the applicant any entitlement to challenge the 'Findings' in the Tribunal's Second Interim Report published on the 26th September, 2002 or the costs ruling dated the 15th October, 2004. To allow an extension of time on this basis would fundamentally undermine the effect and import of the judicial review time limits as provided for in the applicable Rules.

4.3 Order 84 r. 21(1) RSC provides that leave to apply for judicial review shall be made promptly and in any event three months from the date when grounds for the application first arose or six months where the relief sought is *certiorari*, unless the Court considers that there is "good reason" for extending the period within which the application shall be made. In *De Roiste v. Minister for Defence* [2001] 1 IR 1 Fennelly J. held as follows at 2:-

> "The phrase 'good reasons' is one of wide import which it would be futile to attempt to define precisely. However, in

> considering whether or not there are good reasons for extending the time I think it is clear that the test must be an objective one and the court should not extend the time merely because an aggrieved plaintiff believed that he or she was justified in delaying the institution of proceedings. What the plaintiff has to show (and I think the onus under O. 84, r. 21 is on the plaintiff) is that there are reasons which both explain the delay and afford a justifiable excuse for the delay."

The onus was clearly on the applicant to show there are reasons which both explained the delay and afforded a justifiable excuse it. The respondent submits that the applicant failed to discharge this onus.

4.4 On the 26th September, 2002 the Second Interim Report of the Planning Tribunal determined that the applicant had made a corrupt payment of £35,000 to Mr. Ray Burke in May 1989. On the 15th October, 2004 the second named respondent refused the applicant's application for costs. He did so on the basis that the applicant had obstructed and hindered the Tribunal. On the 7th March, 2011 the second named respondent refused to revisit this costs decision. The respondents submit that the applicant's cause of action and complaint referable to the ruling on costs commenced and started to run on the 15th October, 2004. A three month declaratory relief or six month (*certiorari*) time limit has long since expired. The six month time limit would have expired on the 14th April2005.

4.5 In the applicant's affidavit filed on the 18th July, 2011 grounding the application for leave, the Second Interim Report of the Planning Tribunal published on the 26th September, 2002 is described at paragraphs 19 to 24. The affidavit refers to the substantial costs incurred by Mr. Barry in legal representations before the Tribunal. That however is referred to generally in the affidavit. A reason advanced to explain the costs refusal is found in the replying affidavit of Oliver Barry filed on the 4th November 2011 in paragraph 57 as follows:-

> "My situation has now changed in that there 1s a Supreme Court decision in my favour."

This is a reference to the judgment of the Supreme Court in *Murphy v Flood* [2010] IESC 21 delivered over 18 months previously on the 21st April, 2010. It is argued that the subsequent judgment of the Supreme Court cannot be taken into account as an explanation for the applicant's delay.

4.6 The decision of the second named respondent refusing the applicant his costs is described at paragraph 24 of the applicant's verifying affidavit filed on the 18th July, 2011. The explanation given for the delay in instituting judicial review proceedings on the 18th July 2011 is described in paragraphs 25 and 30 of the affidavit. The applicant was aware of a challenge by another party and the applicant resolved to await the outcome of that challenge. This is understood to refer to the subsequent challenge instituted by way of plenary proceeding in *Murphy v Flood* concerning the refusal of costs to those plaintiffs made by the Tribunal on the 9th November, 2004. The applicant further states that he did not believe it would be possible to negotiate a contingency arrangement with his legal representatives and he was not otherwise in a position to fund a legal challenge. This is the only explanation given in the verifying affidavit filed on the 181h July, 2012 for the delay regarding the declaratory reliefs applied for if the applicant is successful in his application for *certiorari*. The affidavit would appear sworn on the basis that there is no requirement to give any explanation for delay as the leave application has been made within a six month period from the 7th March, 2011. Amongst the grounds of relief sought in the statement required to ground application for judicial review at paragraph D (vii) is the following: "If necessary, an extension of time to bring the within proceedings". The nearest to a general explanation given is in paragraph 30 of the verifying affidavit where the applicant states:-

> "I resolved to challenge this decision [of 7th March, 2011 refusing my costs] provided I could minimise a risk of incurring further legal costs. I sought legal representation on a no foal no fee basis. I met with my legal advisers in this capacity on the 11th April, 2011. It took me some time to arrange counsel on that basis but I was eventually successful in doing so in early July 2011."

In the replying affidavit of the applicant, further reference is made to his substantial indebtedness as a consequence of the costs paid for legal representation before the Planning Tribunal. On the costs decision of the second named respondent dated the 15th October, 2004 the applicant received legal advice from his solicitors and counsel regarding a challenge to this decision either in judicial review proceedings or in plenary proceedings. This is described in paragraphs 48 to 55 of the replying affidavit filed on the 4th November, 2011. The applicant had been informed of the institution of proceedings challenging a similar costs ruling on behalf of Joseph Murphy and Others which subsequently resulted in the Supreme Court judgment in *Murphy v Flood* delivered on the 21 April 2010. Having taken legal advice, the applicant decided not to challenge the costs ruling. The draft judicial review proceedings in the name of the applicant are included in Exhibit OB15 to the replying affidavit of Mr. Barry (draft judicial review proceedings) and in the second affidavit of Susan Gilvarry (exhibit SG6) (draft plenary summons and draft engrossed plenary summons). The applicant states in paragraph 48 of his replying affidavit that he instructed his legal advisers that he wished to issue proceedings challenging the refusal of the second named respondent to award him his costs of €611,101.46 incurred before the Tribunal. Having considered the legal advice received and notwithstanding the draft pleadings furnished, the applicant gave instructions to go no further. Those instructions were given on the 17th December, 2004 as described in paragraphs 48 to 55 of the replying affidavit.

The exhibit SG6 to the second affidavit of Susan Gilvarry filed on the 14th November, 2011 includes the text of the draft plenary summons and the draft engrossed plenary summons. The draft engrossed plenary summons claims an order setting aside the decision and order of the first named defendant dated the 15th October, 2004 wherein he refused the plaintiff his costs before the Tribunal. The second named respondent in rejecting the applicant's application to revisit the costs decision of the 15th October, 2004 referred to the practice of issuing a plenary summons challenging his decision and allowing it to abide the outcome of similar proceedings. No such steps were taken by the applicant notwithstanding the advice received and the draft plenary summons prepared. The draft engrossed plenary summons which was furnished to the applicant on the 8th December, 2004, as referred to in paragraph 48 of his replying affidavit, would have been sufficient for the purposes of indicating a similar challenge to the plenary proceedings already instituted by plenary summons in *Murphy v Flood* on the 20th April, 2004. In the circumstances, the applicant has slept on his rights.

4.7 Notwithstanding the financial difficulties mentioned, the issuing and serving of a plenary summons to abide the outcome of a known legal challenge in December 2004/January 2005 would have protected his interests and would have entailed minimal costs consequences. The applicant decided not to issue those plenary proceedings having taken legal advice and discussed the matter with his family. When the respondents' notice of motion in the recent plenary proceedings was issued, the only facts brought to the respondent's notice were the facts referred to in the applicant's grounding and verifying affidavit sworn on the 18th July, 2011 in which there was no reference to the plenary proceedings. In circumstances where the applicant has taken no steps to prosecute the plenary proceedings and instead has instituted judicial review proceedings which repeat the relief sought in the plenary proceedings, the said plenary proceedings should be struck out with the usual cost consequences.

4.8 The duty to disclose at the *ex-parte* stage requires the utmost good faith of an applicant. There has to be material disclosure at

the *ex parte* application and this material disclosure of material facts must be deposed to in the grounding affidavit. In his replying affidavit filed on the 4th November, 2012 the applicant states in paragraph 63 that Mr. Justice Peart was informed verbally by counsel of the existence of the plenary proceedings and the motion which the respondents instituted to have those plenary proceedings struck out. Having regard to the obligation of utmost good faith and candour that applies to any applicant for *ex parte* relief in judicial review proceedings, the existence of the plenary proceedings should have been clearly stated in the grounding affidavit. The applicant failed in his Grounding affidavit to depose to the fact that the respondents had already issued a motion to dismiss the plenary proceedings when the *ex parte* leave was sought. It is respectfully submitted that this was a material non-disclosure and that this should be taken into account when this Court is exercising its discretionary powers.

4.9 The Second Interim Report published on the 26th September, 2002 and the original costs ruling of the 15th October, 2004 concerned matters long concluded within the relevant statutory provisions of the Tribunal of Inquiry (Evidence) Acts. Matters are concluded and the Tribunal deals with other matters within its terms of reference. The work of the Tribunal otherwise would be prejudiced. It is submitted that the applicant has slept on his rights and having done so is bound by his conduct.

Applicants Submissions
5.1 The respondents argue that the applicant's leave should be set aside due to a lack of full and frank disclosure at the *ex parte* leave stage. This argument is based upon the fact that the applicant's affidavit failed to mention that a Plenary Summons had issued on 7th June, 2011 and that the respondent had issued a Notice of Motion to dismiss those proceedings for want of prosecution. It is stated in the applicant's replying affidavit, sworn on 4th November, 2011 (paragraphs 58-72) that Peart J. was informed verbally by counsel for the applicant that a Plenary Summons and Notice of Motion to dismiss had issued. It is not in dispute that the Court was informed by counsel on 18th July, 2011 as outlined in that affidavit. The applicant submits that it is surprising that this issue is being pursued and argues that the respondent's submission that it was a more appropriate matter for the grounding affidavit is now *de bene esse*. The test a court should apply when considering whether to set aside leave for nondisclosure is outlined in the case of *Bambrick v. Cobley* 2005 IEHC 43. In this case Clarke J. stated at p.583-4

> "... the following factors appear to me to be the ones most likely to weigh heavily with the court in such circumstances:-
>
> 1. The materiality of the facts not disclosed.
>
> 2. The extent to which it may be said that the plaintiff is culpable in respect of a failure to disclose..."

In relation to the first strand of the test the Court has to consider 'the materiality of the facts not disclosed'. When considering the materiality of the facts not disclosed in the applicant's case it is submitted that whether the Plenary Summons had issued or not was not central to the kernel of the argument on which the leave application was based. Leave was sought on the basis that the respondent made an *ultra vires* decision when refusing the applicant costs on 15th October, 2004 and then breached fair procedures and made an error in law in refusing to vacate that order in its decision of 7th March, 2011. The applicant submits that the issuing of a Plenary Summons was not central to the facts at issue in this case.

Secondly the Court must look at the culpability of the applicant in failing to disclose and whether it was a deliberate misleading or an innocent omission. It was clearly an innocent omission that this fact was not contained in the affidavit of the applicant as it was revealed to the Court by Counsel at the leave stage.

5.2 Order 84 Rule 21 of the Superior Court Rules, provides that leave to apply for judicial review shall be made promptly and in any event three months from the date when grounds for the application first arose or six months where the relief sought is certiorari, unless the court considers that there is "good reason" for extending the period within which the application shall be made. The decision the applicant seeks to challenge in D (i) of his Statement of Grounds, was made on the 7th March, 2011. It is submitted that this was a further decision on the part of the respondent, subsequent to their decision on the 15th October, 2004. The respondent accepts that the applicant is within time from the 7th March, 2011 decision. The respondents now seek to argue that the decision of the 15th October, 2004 cannot be challenged as it is "concluded" and may be regarded as a "past or closed legal dealing". They were entitled to rely on this when they were asked to reconsider the initial costs refusal decision in July-September 2010. Instead, and quite appropriately as there had been a change of circumstances with the decision of the Supreme Court in *Murphy & Ors v. Flood* [2010] IESC 21, they invited legal submissions, from the applicant. The applicant made extensive legal submissions. The respondent then issued a decision on the 7th March, 2011. It was a reasoned decision coming 4 months after the applicant's legal submissions. It outlined 6 reasons as to why the respondent was refusing to reconsider the applicant's costs application. The 7th March, 2011 decision came some 8 months after the applicant had first written to the respondent asking them to reconsider his costs application in light of the decision in *Murphy v Flood & Ors*. It is submitted that the March decision was a new decision. It was entirely different in wording and nature to the decision issued by the respondent on the 15th October, 2004. The applicant sought leave to challenge this decision on the 18th July, 2011. This is clearly within the 6 month time limit as defined in the Rules.

5.3 The respondents in their Notice of Motion maintain that the time ran from the 15th October, 2004 and there has been a lengthy delay on the part of the applicant. The applicant answers by outlining the history of the case to date. On 12th July, 2000 the applicant was told by Counsel for the Tribunal that he would be called to give evidence in mid-July 2000 (i.e. three or four days later). An impression was conveyed that he would conclude his evidence by the end of July or shortly thereafter. He engaged solicitors along with Senior and Junior Counsel to attend the Tribunal hearings. He was called as a witness in December of 2000. He gave evidence for approximately 14 days from then until February 2001. In 2000, when he became involved in the Tribunal, he was drawing an annual salary of €50,000 from his golf course enterprise. In 2002 he earned a total of €103,095 from the golf course and a concert promotion; in 2003 he earned €50,000 from the golf club. His legal fees from his involvement with the Tribunal ultimately cost him €611,000 by December 2002. He had no other savings or cash reserves. By 2004, the year in which the cost refusal decision was issued his financial situation was that he earned €46,000. He had a short term loan of €220,000 and had to increase his overdraft from €60,000 to €250,000. He had a further loan of €575,000 with Ulster Bank. All these facilities were to be reviewed at the end of 2004. By the time the costs decision came on 15th October, 2004 he was not in a financial position to acquire further borrowings to fund a legal challenge against the October decision. He was advised that a leave application would cost about €20,000 and a full hearing in the region of €100,000. In addition to that he had been advised that it was likely that he would not succeed and could be faced with the Tribunal's costs as well. However once the Supreme Court decision of *Murphy v Flood & Ors* issued in April 2010 the applicant had a much stronger case and he was also able to secure Counsel on a contingency basis subsequent to the 7th March, 2011 decision. To debar the applicant from taking these proceedings because of a delay that was principally because of his financial inability to take the proceedings in 2004, which was almost entirely as a result of the legal costs he incurred through his engagement with the Tribunal, would be unfair, unjust and inequitable. His ability to fund the challenge was undermined by the manner in which the respondent itself conducted its affairs as a result of which he incurred substantial legal costs.

5.4 In light of the *Murphy v Flood & Ors* decision the applicant argues that he now has a very strong case that the costs refusal

made against him by the respondent on 15th October, 2004 was made *ultra vires.* It is submitted that the procedure of judicial review is there to protect against public authorities acting in excess of jurisdiction and it would be unfair to prevent the applicant from now seeking redress from such a wrong because he failed to take a case at an earlier opportunity due to the fact that jurisprudence was against him and his financial situation was strained. It is submitted that for these reasons, the balance of justice lies with allowing the applicant's case to proceed to substantive hearing.

5.5 The respondent contends that the applicant wishes to challenge the finding that he had made a corrupt payment in the sum of £35,000 to Mr. Ray Burke contained in the Second Interim Report of the Tribunal. The applicant does in fact dispute this finding but is not challenging it in these proceedings. He is only seeking to rely on *Murphy v Flood & Ors* to argue that the respondent is not entitled to make a finding of obstruction and hindrance against him in the Second Interim Report. The Supreme Court found that the findings of obstruction and hindrance in the Second Interim Report were *ultra vires* in that they were outside the Terms of Reference of the Tribunal and any legislation governing the Tribunal and amounted to a finding of criminal conduct. In response to the respondent's submission regarding the failure to prosecute the Plenary Summons, the applicant is prepared to agree that the Plenary Summons be struck out but submits that costs should not be awarded against him. The respondents argue that the applicant could have issued a Plenary Summons in December 2004/January 2005 and that this would have had minimal costs implications. This is contested. At paragraph 50 of his replying affidavit the applicant states that he was given legal advice that issuing a Plenary Summons would likely have been met with an application for dismissal for want of prosecution if he did not file a Statement of Claim, and if he did file a Statement of Claim it would have

proceeded to full trial. There was also always the possibility that his case would be fast tracked with the *Murphy v Flood & Ors* case. It was not likely that the applicant could issue a Plenary Summons and sit on his hands with no costs implications.

5.6 The principles applicable to applications to set aside leave are as follows

> (i) The Court's inherent power to grant an application to set aside leave should be granted "sparingly" and in "exceptional cases";
>
> (ii) The leave procedure was intended to provide a filtering process;
>
> (iii) The applicant for the order to set aside carries a heavier burden than the original applicant for leave and has to show that leave should not be granted;
>
> (iv) The applicant at leave stage has a "low threshold" to meet and a "light" burden of proof and only has to show an arguable case;
>
> (v) The test for the applicant at leave stage is as laid out in *G v Director of Prosecutions* [1994} 1 IR 374:
>
> (a) has sufficient interest;
>
> (b) The facts on the affidavit if proved support a stateable ground;
>
> (c) The facts make an arguable case in law;
>
> (d) The application was made in the 6 month time limit;
>
> (e) The only effective remedy is through judicial review.

It is submitted that the applicant has met the 'light' burden of proof at the leave stage and fulfilled the test as laid out in *G v Director of Prosecutions*.

> (a) The applicant has sufficient interest in that he is directly affected by the decision he seeks to challenge;
>
> (b) He has a stateable case in that the facts averred to, if proved, were capable of demonstrating the respondent's costs refusal order was made *ultra vires* and in breach of fair procedures;
>
> (c) There is an arguable case, following Murphy v. Flood & Ors that the respondents acted *ultra vires* in (1) Making a finding of obstruction and hindrance; (2) basing the costs refusal decision on that finding and on the substantive findings of the Second Interim report.
>
> (d) The application was made within time;
>
> (e) Judicial review is the appropriate remedy in the case.

In this motion it is not for the applicant to prove he has a stateable case. The High Court has already granted him leave in that respect. It is for the respondent to prove that he never should have been given leave in the first place. The respondent faces a very heavy burden for the leave decision to be set aside. The applicant submits that the respondent has not discharged this heavy burden in any of their grounds.

Decision of the Court
6.1 The jurisdiction to set aside a leave granted is set out in the passage cited above by McGuiness J. in *Adam and Iordache v. The Minister for Justice* [2001] 3 IR 53, where she relied on the following passage by McCracken J. in *Voluntary Purchasing v Insurco Limited* [1995] 2 ILRM 145.

> "In my view, however, quite apart from the provisions of any rules or statute, there is an inherent jurisdiction in the courts in the absence of an express statutory provision to the contrary, to set aside an order made *ex parte* on the application of any party affected by that order. An *ex parte* order is made by a judge who has only heard one party to the proceedings. He may not have had the full facts before him or he may even have been misled, although I should make it clear that that is not suggested in the present case. However, in the interests of justice it is essential that an *ex parte* order may be reviewed and an opportunity given to the parties affected by it to present their side of the case or to correct errors in the original evidence or submissions before the court. It would be quite unjust that an order could be

made against the party in its absence and without notice to it which could not be reviewed on the application of the party affected."

The respondent seeks the opportunity to make that case.

6.2 The approach of the Courts to an application to set aside leave obtained has been set out in the following passage of Bingham L.J in *R v Secretary of State for the Home Department, ex parte Chinoy* (1992) 4 Admin. LR 7 [1992] COD 381, approved by the Supreme Court in both *Adam and Iordache* case and in *Gordon v. Director of Public Prosecutions* [2002] 2 IR 369. Bingham L. J stated as follows;-

> "I would unhesitatingly accept that those are grounds upon which the court could exercise its discretion to set aside leave previously given. But I would not accept the suggestion that the court's jurisdiction may only be exercised where nondisclosure or new factual developments are demonstrated. It seems to me that it is a jurisdiction which exists and which the court may exercise if it is satisfied on inter partes argument that the leave is one that plainly should not have been granted.
>
> I would however, wish to emphasise that the procedure to set aside is one that should be invoked very sparingly. It would be an entirely unfortunate development if the grant of leave ex parte were to be followed by applications to set aside inter partes which would then be followed, if the leave were not set aside, by a full hearing. The only purpose would be to increase costs and lengthen delays, both of which would be regrettable results. I stress therefore that the procedure is one to be invoked very sparingly and it is an order which the court will only grant in a very plain case. I am, however, satisfied, as I have indicated, that the court does have discretion to grant such an order if satisfied that it is a proper order in all the circumstances."

In *Adam and Iordache v. The Minister for Justice* [2001] 3 IR 53 McGuiness J. having cited the above continues at 72:-

> "I would accept ... that this jurisdiction should only be exercised very sparingly and in a very plain case. The danger outlined by Bingham L.J. in the passage quoted above would be equally applicable in this jurisdiction. One could envisage the growth of a new list of applications to discharge leave to be added to the already lengthy list of applications for leave. Each application would probably require considerable argument - perhaps with further affidavits and/or discovery. Where leave was discharged, an appeal would lie to this court. If that appeal succeeded, the matter would return to the High Court for full hearing followed, in all probability, by a further appeal to this court. Such a procedure would result in a wasteful expenditure of court time and an unnecessary expenditure in legal costs; it could be hardly said to serve the interests of justice. The exercise of the court's inherent jurisdiction to discharge orders giving leave should, therefore, be used only in exceptional cases."

6.3 The jurisdiction therefore is one that clearly exists but one only to be granted sparingly in exceptional cases where the Court is satisfied that it is a proper order in all the circumstances.

6.4 The relevant circumstances surrounding this case are not in dispute. The order for costs in question was made against the applicant on the 15th October, 2004. In making this order the chairman of the Tribunal relied upon a finding that the applicant had obstructed and hindered the work of the Tribunal. The applicant took the advice of solicitor and counsel and decided not to issue proceedings challenging this costs decision by the Tribunal. His decision was based upon the impecuniosity caused by the cost of his legal representation and his being advised it was unlikely he would succeed. He was aware that another party subjected to a costs order based on the same grounds of obstruction and hindrance had issued proceedings challenging the legality of that decision.

6.5 These other proceedings resulted in a decision of the Supreme Court delivered on 21st April, 2010. See *Murphy v Flood.* In this judgment the Supreme Court held that the same decision made on the same basis as in the applicants case was *ultra vires* the Tribunal. As a result of this decision the applicant resolved that he would ask the Tribunal to revisit and change its order for costs against him. He did this in writing on the 22nd July 2010. The Tribunal invited the applicant to make submissions. He did so and these were considered by the Tribunal. It gave its decision on the 7th March 2011 and refused to reconsider the order made in 2004.

6.6 The applicant resolved to challenge this decision and on the 7th June 2011 issued a plenary summons. On the 13th June 2011 an appearance was entered to this by the respondents who further on the 12th July 2011 issued a motion to dismiss those proceedings on grounds of delay and want of prosecution. The applicant responded to this by applying on 18th July 2011 for leave to seek the relief herein. This was granted *ex parte*. On the 29th July 2011 the respondents issued this motion to set aside that leave. The grounds for this motion are

> (i) Non disclosure of the existence of the plenary proceedings.
>
> (ii) Long delay.
>
> (iii) Proceedings an abuse of process, frivolous and vexatious.
>
> (iv) The interests of justice and the public interest.
>
> (v) Non disclosure.

6.7 I am informed by Hugh Mohan Senior Counsel for the applicant that, although the existence of the plenary proceedings was not revealed in the grounding affidavit for leave he did tell the *ex parte* Judge in his oral submissions of their existence. This is accepted by James O'Reilly SC for the respondents and I accept it too. It is however a very undesirable thing in my view that the court and the respondents should be put in this position. Such matters should be set out in the grounding affidavit. However I propose to pass on from this objection of the respondents as I accept there was in fact no material non disclosure in this application because the Judge hearing the *ex parte* application was informed of the existence of the plenary proceedings.

6.8 (ii) Long delay,

> (iii) Proceedings an abuse of process, frivolous and vexatious,
>
> (iv) The interests of justice and the public interest.

It seems to me that theses three headings can be dealt with together. There is no delay issue in relation to the March 2011 decision of the tribunal. The real issue is whether or not delay defeats the action tore open the 2004 decision of the Tribunal. Any other order would be of no value to the applicant.

6.9 It is undisputable that the delay regarding the 2004 decision is very great and far outside that which would normally allow for an extension of time in judicial review proceedings. The test is a well known one and concisely described by Hardiman J. in *BTF v. Director of Public* Prosecutions [2005] 2 IR 559 at para 16;

> "The courts have an inherent jurisdiction to dismiss proceedings where the party instituting them has been guilty of inordinate and inexcusable delay. However, even where the delay is both inordinate and inexcusable, the court must decide whether, having regard to the facts of the particular case, the balance of justice is in favour of or against, its being permitted to proceed."

It is therefore for the court to determine whether there has been inordinate and inexcusable delay. If there has, then having regard to the facts of the case, where does the balance of justice lie.

6.10 I have to bear in mind that this application is one to set aside a leave granted. It is not the substantive hearing. Neither side has yet had the opportunity to deploy the full arsenal of weaponry they may wish to bring forth. I am therefore dealing with arguability rather than determining substantive issues. The real reason proffered by the applicant for the lengthy delay involved is his impecuniosity at the time, caused moreover he claims by his poorly structured appearances at the tribunal. He claims he was advised that any challenge to the 2004 costs decision would be unlikely to succeed. He says that he could not afford to take the chance. I can accept the arguability of those reasons as possibly excusing the undoubtedly inordinate delay. Whether they do or not is a matter for the substantive hearing..

6.11 Even were these reasons to be found wanting in excusing the inordinate delay, the court would have to direct its inquiry into questioning where the balance of justice lay. In this case at this early stage in the proceedings it is possible to identify the real ground under this heading and consider if it is arguable. Does the apparent illegality of the 2004 decision make it a nullity. If it does, is it an injustice that such a decision could cost the applicant over €600,000 and leave him financially ruined as he claims. This certainly seems arguable. The balance of justice at this stage of the proceedings would appear to be in favour of the applicant.

6.12 A further consideration for the court is the merits of the applicants case. In *GK v. Minister for Justice Equality and Law Reform* [2002] 2 IR 418 the Supreme Court in considering an extension of time pursuant to s. 5 (2) (a) Illegal Immigrants (Trafficking) Act 2000 Hardiman J. observed that;

> "[i]n ... circumstances where the court is called upon to extend a period of time limited for the taking of any step, or considers an application to strike out proceedings in the exercise of inherent jurisdiction, the merits of the substantive case are considered relevant."

The learned judge went on to note that in *Guerin v Guerin* [1992] 2 IR 287 the Supreme Court had been influenced by the fact that the plaintiff had a;-

> "very strong, indeed almost unanswerable, case on the merits of the substantive action so that' an obvious and substantial injustice' would be done to him if deprived of the opportunity to litigate his claim."

I should not make a finding at this stage as to whether those principles arise here but I may consider whether it is arguable that they do. Bearing in mind the apparent similarity in the reasons given by the Tribunal to both the applicant herein and the applicant in *Murphy v Flood* (cited above) as to the reasons for the costs decision, it seems clear to me that the applicant has an arguable case to make.

6.13 For all those reasons, although the delay period requiring justification at the substantive hearing stage is clearly inordinate, the questions of excusability and location of the balance of justice seem to me very arguable ones indeed. The facts of this case are extremely unusual. Perhaps therefore the courts attitude to extending time which normally looks at weeks or months rather than years might well be somewhat different. That is a matter to be decided at the substantive hearing. The application to set aside the leave granted is refused.