Neutral Citation Number: [2009] IEHC 428

THE HIGH COURT

2009 49 JR

Owen O'Callaghan, John Deane, Riga Limited, Barkhill Limited, Aidan Lucey,

Claire Cowhig and CHK Partnership

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 O'Neill J. delivered the 6th day of October, 2009.

1. Relief Sought

1.1 Leave was granted by this Court (Peart J.) to the applicants to seek the following reliefs by way of judicial review on the 19th January, 2009:-

1. An order *of certiorari* quashing the decisions of the 28th October, 2008, the 19th December, 2008, and the 22nd December, 2008, whereby the respondents refused to furnish to each of the applicants a copy of any proposed draft findings referring to the said applicants to be incorporated in the report to be prepared by the tribunal of inquiry of which the respondents are the members.

2. An order of *mandamus* directing the respondents to provide to each of the applicants a copy of any proposed draft findings referring to the said applicants to be incorporated in the report to be prepared by the tribunal of inquiry of which the respondents are the members and to provide the said applicants with a reasonable opportunity of being heard thereon.

3. A declaration that each of the applicants are entitled to copies of any proposed draft findings referring to the said applicants which the respondents propose to incorporate into their report, for the purpose of making a submission thereon to the respondents.

2. Factual background

2.1 The first, second, fifth and sixth applicants are witnesses who gave evidence at the Tribunal of Inquiry into certain Planning Matters and Payments ("*the tribunal*"), which was established by resolution of the Oireachtas in October 1997 to investigate the planning history of 726 acres of land in North County Dublin. Its terms of reference were later extended by a number of instruments to empower it to investigate all improper payments made to politicians in connection with the planning process. The tribunal initially conducted its investigations in private and then began public hearings, extending over 900 days.

2.2 The involvement of the first named applicant with the tribunal arises from an acquisition by the fourth named applicant of an interest in the Quarryvale site in West County Dublin. The first named applicant is a property developer and a director of the third and fourth named applicants. The second named applicant is a solicitor and property developer and a director of the third and fourth named applicants. The fifth named applicant is secretary of the third and fourth named applicants and employed by them. The sixth named applicant is an accountant in practice in the seventh named applicant. All of the applicants, with the exception of the fifth named applicant, have been granted legal representation at the tribunal. The first, second, fifth and sixth named applicants have given evidence to the tribunal. The first named applicant has provided fifteen statements to the tribunal and the second named applicant has provided three statements to it. The fifth and sixth named applicants have each furnished one statement to the tribunal. In addition, the first and second named applicant has sworn eleven affidavits of discovery and has provided in excess of 35,000 documents to the tribunal. The seventh named applicant has produced more than 8,930 documents to the tribunal by way of discovery.

2.3 By letters dated the 13th October, 2008, and the 23rd October, 2008, the tribunal invited the applicants to make submissions as they saw fit for its consideration prior to its determination, which could include the following:-

> *"1. Reference to any issues which your client believes arises in the context of the module in which he gave evidence;*
>
> *2. Reference to any evidence which your client believes supports his evidence to the Tribunal;*
>
> *3. Reference to any evidence which your client believes establishes that the evidence of the other witnesses should be rejected on any particular issue;*
>
> *4. Reference to the relevance of any particular evidence to any of the issues raised in the module;*
>
> *5. Reference to any acts or omissions relevant to the issue of cooperation with the Tribunal by your client or by others."*

2.4 The applicants enquired on the last day of the public tribunal hearings, that is, the 22nd October, 2008, as to whether or not draft findings or criticisms would be made available to them in order for them to make submissions on them. The tribunal indicated that it would not be circulating copies of draft findings. It confirmed this position in correspondence dated the 28th October, 2008. The third and fourth paragraphs of that letter read as follows:-

> *"All relevant parties have had access to the evidence given by witnesses in the course of the public hearings, and all parties have been provided with the opportunity to cross-examine witnesses where appropriate. Furthermore all parties whose evidence may be referred to in the Tribunal's Report have been provided with an opportunity to furnish written submissions to the Tribunal.*
>
> *In arriving at its said decision, the Tribunal has had regard to the similar approach adopted by this Tribunal in relation to its Second and Third Interim Reports in 2002 and 2003 respectively, the approach adopted by most Tribunals of Inquiry in this country in recent years, and the Judgment of Smyth J. in Joseph Murphy & Ors. –v- Mahon (delivered 14.2.2006)."*

2.5 The applicants, through their solicitors, again sought draft findings by letter dated the 17th December, 2008. Paragraphs 24 and 26 of that letter outlines the applicants' position in the following terms:-

> *"Our clients have been involved in a lengthy and time consuming process before the Tribunal. They have co-operated fully, made discovery and given oral evidence. They now wish to make written submissions to the Tribunal. It is possible to divine from the evidence of Mr. Tom Gilmartin and Mr. Eamon Dunphy allegations which may concern wrongdoing on the part of our clients. Our clients will, insofar as they can identify them, make written submissions concerning these allegations. However, it is unduly burdensome and oppressive to have to make submissions in the absence of knowledge of any other allegations being investigated by the Tribunal concerning our clients. Much of the evidence did not deal with issues raised by Mr. Tom Gilmartin or Mr. Eamon Dunphy and yet our clients are being compelled to make submissions without knowing what allegations, if any are made against them.*
>
> *…*
>
> *Please note that we are not calling upon the Tribunal to provide a copy of the draft report but merely details of the proposed adverse findings against our clients. These details are essential in circumstances where no statement of allegations has been made by the Tribunal, or its Counsel, as against our clients. In essence our clients are being forced to identify what they consider to be allegations falling within the remit of the Tribunal which might be made and making written submissions on issues which may or may not in fact constitute allegations and which may or may not be of any concern to or fall within the remit of the Tribunal. In its Affidavits to the High Court during the course of the judicial review proceedings the Tribunal has indicated that certain matters will not be the subject matter of any findings but the Tribunal has never set out what allegations against our clients it considers may form the basis of any findings. The sheer volume of material available to the Tribunal, and the limitless possibilities of inferences that the Tribunal might seek to draw, means that it would be oppressive to require our clients now to address this material in submissions in the absence of proposed findings. Indeed, in the absence of such proposed findings it would be impossible to make any meaningful submissions on this material."*

2.6 The tribunal replied to the first four named applicants by letter dated the 19th December, 2008, reiterating that it did not intend to make draft findings available. It stated:-

> *"9. …*
>
> *In the preparation of its report the Tribunal will, wherever possible and when appropriate, endeavour to determine issues and conflicts in evidence between parties which were the subject of public inquiry or which arose in the course of the public hearings, whether or not such issues or conflicts arose directly or indirectly from allegations made by the parties. The Tribunal is not restricted to determining issues which solely arise from allegations. The Tribunal is primarily concerned in making findings on those issues which were properly canvassed in the course of its public hearings whether or not they arise from allegations made by any party.*

…

> *Where the Tribunal makes findings (be they adverse or otherwise) the subject matter and evidence relating to and supporting such findings will have been fully canvassed with the relevant witnesses in the course of the public hearings. The Tribunal will not make adverse findings against individuals who gave evidence in the course of the public hearings in circumstances where those individuals was (sic) not provided with the opportunity to sufficiently deal with the matters in question, including the opportunity to cross-examine relevant witnesses where practicable."*

2.7 This date of this letter, the 19th December, 2008, was the original deadline set by the tribunal for the delivery of written submissions. This date was extended to the 31st January, 2009. The tribunal also wrote to the fifth, sixth and seventh respondents by letter dated the 22nd December, 2008, declining the request. The applicants have prepared written submissions going to in excess of 1,000 pages. These proceedings were subsequently instituted and leave was granted on the 19th January, 2008.

3. Scheme of notification

3.1 Having conducted its preliminary investigations in private, the tribunal issued a document entitled "*Explanatory memo re: rezoning module*" on the 12th December, 2003, which set out the procedures the tribunal would adopt. It outlined

that documents were gathered during the preliminary investigation and that documents relevant to the public hearing would be assembled to form a brief, to be furnished to persons affected or likely to be affected by the evidence to be heard at the public hearings of the tribunal. Such a brief was circulated to parties interested in the "*Quarryvale I*" module, which covered the years 1987 to 1990, including the first four named applicants. That module concerned allegations in respect of a development at Bachelor's Walk in Dublin City and the lands at Quarryvale in West County Dublin. The brief was over 3, 000 pages long and contained statements from proposed witnesses and other material. A brief was also circulated in respect of the "*Quarryvale II*" module, which was updated a number of times and ran to some 34,057 pages by the time that module had concluded. That module dealt with the years subsequent to 1990.

3.2 On the 3rd March, 2004, the first day of the Quarryvale I module, counsel for the tribunal, in an opening statement, described how the tribunal proposed to conduct its business and identified the issues that the tribunal would investigate. A further opening statement was made on the 29th November, 2005, at the beginning of the Quarryvale II module. Following an adjournment of the tribunal due to judicial review proceedings and the holding of a general election, a further opening statement was delivered by counsel for the tribunal on the 28th May, 2007. This primarily concerned Mr. Bertie Ahern, the then Taoiseach. It was made clear during the course of the opening statements that additional issues may arise during the course of the public hearings.

3.3 Evidence was given by witnesses during the public hearings which referred to material which the applicants had an interest in. Transcripts of the evidence were made available on a daily basis. Of particular interest to the applicants were allegations made by Mr. Tom Gilmartin against the first and second named applicants and allegations made against the first named applicant by Mr. Eamon Dunphy. On the 24th March, 2004, an issue arose as to the provision of the previous statements of Mr. Gilmartin to the tribunal. The first named applicant instituted judicial review proceedings in this regard and was successful in obtaining a declaration to the effect that the tribunal's decision to refuse to provide him with access to all the statements made by Mr. Gilmartin infringed his right to natural and constitutional justice (*O'Callaghan v. Judge Alan Mahon & Others* [2006] 2 I.R. 32).

3.4 It is agreed that evidence that could be construed as adverse to the last three applicants in these proceedings was not given during the course of tribunal's hearings.

3.5 The tribunal has corresponded with the applicants since the 15th October, 1998. When evidence was given in public hearings which had the potential to adversely affect the applicants, the tribunal wrote to them and furnished them with extracts from any relevant statements or documents and requested them to provide an explanation. The applicants were given an opportunity to cross-examine witnesses who gave evidence against them and the applicants themselves gave evidence.

4. Issue

4.1 The core issue that falls to be determined in these proceedings is whether or not the applicants are entitled to notice of the provisional or preliminary findings of the tribunal on matters affecting the applicants, to enable them to address their submissions to these findings.

5. The applicants' submissions

5.1 Counsel for the applicants, Mr. Sreenan S.C., submitted that natural and constitutional justice, in particular, the guarantee of *audi alterm partem*, required that the applicants be provided with the draft findings of the tribunal and an opportunity of responding to those findings to vindicate their constitutional rights, specifically, their right to their good names. He submitted that because of the enormous tapestry of events stretching over many years which were the subject matter of the tribunal's inquiry, the applicants could not make meaningful submissions in respect of any contemplated adverse findings against them, without some guidance from the tribunal in the form of provisional findings. He pointed out that there were no specific references made to the applicants in the terms of reference and he noted that a statement of allegations had never been made by the tribunal against any of the applicants. In essence, he argued that the applicants could not, with precision, pinpoint the entirety of, or many of the elements of the case being made against them, which he submitted, they had an entitlement to know.

5.2 He submitted that the task the applicants were expected to undertake was to identify potential allegations or criticisms that may be made against them and to answer them in the context of a large mass of evidence. He argued that they might not identify the correct matters, that they may create allegations against themselves or that they may deal with matters that the tribunal is not concerned with. To institute judicial review proceedings seeking to set aside adverse findings after they had been made, in his submission, would be cold comfort to the applicants in circumstances where damage to their reputations would have already occurred.

5.3 Mr. Sreenan highlighted that the practice of formulating potential findings or criticisms and furnishing them to the persons against whom they may be made had been followed in company law inquiries such as the Ansbacher inquiry and the National Irish Bank inquiry. He relied on the dictum of Kelly J. in *Prendiville v. The Medical Council* [2007] I.E.H.C. 427 in respect of the practice of non-statutory inquiries in this regard. He noted that the Moriarty tribunal had adopted this practice also.

5.4 Mr. Sreenan sought to distinguish the case of *Murphy v. Flood Tribunal* [2006] I.E.H.C. 75 upon which the respondents relied, on the basis that that case concerned a specific finding of a lack of co-operation with a tribunal which had not been challenged and the subsequent imposition of a costs order on the applicant. The applicant in that case, in his submission, would have been well aware of the prior finding against him of a lack of co-operation, in contrast with the applicants in the instant case. He submitted that the other case upon which the respondents relied, that of *Maxwell v. Department of Trade and Industry and Others* [1974] 2 All E.R. 122 was to be distinguished on the basis that it was a private inquiry and that the applicant there was provided with an assurance by the inspector that he would be informed of any criticisms that would be made against him and that he would be allowed to answer them.

5.5 He referred to the discovery cases of *Desmond v. Moriarty* [2004] 1 I.R. 334, *Bailey v. Flood* (Unreported, Supreme Court, 28th July, 1998) and *Haughey v. Moriarty* [1999] 3 I.R. 1 to illustrate that a person likely to be affected by an order of discovery should be given notice by the tribunal of its intention to make such an order. He argued that this approach should also be applied to the findings of a tribunal, the consequences of which would be of a far more serious order than the making of an order for discovery.

6. The respondents' submissions

6.1 Mr. Collins S.C., for the respondents, submitted that the full panoply of *In re Haughey* [1971] I.R. 217 rights is the height of what was required of the tribunal, in that, a person against whom evidence is given should be told of that evidence, may confront his accuser and cross-examine him, can call his own witnesses or give his own testimony to refute that evidence and may make submissions through counsel on the evidence. He submitted that these rights had been afforded to the applicant. He argued that it was not implicit in *In re Haughey* that a list of allegations should be furnished to the applicants, in the context of an inquisitorial process. He acknowledged that there may be great potential for damage to reputation but that that was why the *In re Haughey* protections were given to the applicants.

6.2 A distinction was drawn by Mr. Collins between the adversarial process where pleadings set out clearly defined allegations and where the rules of evidence and discovery were in operation and an inquiry into an event or a matter, where natural and constitutional justice must be observed but where no rights are determined or liabilities imposed, apart from costs, and where there are no litigants, only witnesses. He made reference to Lord Scott's article entitled "*Procedures at Inquiries – The Duty to be Fair*" (1995) L.Q.R. 111 (Oct) 596 in this regard.

6.3 Mr. Collins noted that the applicants had made no complaint that they had not been adequately notified of any evidence that may be adverse to them or that they had not been given any opportunity to answer any such evidence or to cross- examine those who gave such evidence. He submitted that the U.K. Report of the Royal Commission on Tribunals of Inquiry (the Salmon report) referred to the requirement that a witness has to be given notice of adverse evidence given against him in the inquiry, though not an actual "*allegation"*.

6.4 He relied on the cases of *Murphy v. Flood Tribunal* [2006] I.E.H.C. 75 and *Maxwell v. Department of Trade and Industry and Others* [1974] 2 All E.R. 122 in support of his submission that natural justice did not require that draft conclusions be furnished to persons against whom adverse findings were to be made in a full public enquiry such as this inquiry. He noted that the decision in *Murphy v. Flood Tribunal* [2006] I.E.H.C. 75 was under appeal.

7. Types of Inquiries

7.1 The tribunal in this case was established pursuant to the Tribunals of Inquiry (Evidence) Act 1921 ("*the Act of 1921"*). This legislation was enacted to enable matters of urgent public importance to be inquired into by independent tribunals, in the instant case matters of public concern about corruption in the planning process. The rules of natural and constitutional justice require that fair procedures be adhered to by such tribunals of inquiry. As held by the Supreme Court in *O'Callaghan v. Judge Alan Mahon & Others* [2006] 2 I.R. 32, the applicant was entitled to the full panoply of rights set down by the Supreme Court in *In re Haughey* [1971] I.R. 217 as a minimum protection. Those rights were identified as follows by Ó'Dálaigh C.J. at p.263:-

> *"… (a) that he should be furnished with a copy of the evidence which reflected on his good name; (b) that he should be allowed to cross-examine, by counsel, his accuser or accusers; (c) that he should be allowed to give rebutting evidence; and (d) that he should be permitted to address, again by counsel, the Committee in his own defence. "*

7.2 There is no authority the applicant could point to that supported the contention that it is a requirement of natural justice in the context of a public sworn inquiry that notice of provisional findings be given to those against whom adverse findings may be made. It is to be noted that the Moriarty Tribunal is the only tribunal established under the Act of 1921 that has issued draft findings to parties affected. At para 1-57 of its part 1 report it states that this "*may arguably have exceeded actual legal requirements*".

7.3 Another type of inquiry is a non-statutory private inquiry. Such an inquiry was set up on the 6th April, 2004, to investigate events at Our Lady of Lourdes Hospital, Drogheda, in particular, the rate of peripartum hysterectomy and the practice of Dr. Neary in relation to such medical procedures. The inquiry was conducted by Harding Clark J. and a report was published in January 2006. The mechanics of that inquiry were, that information was sought on a confidential basis from *inter alia,* women on whom such procedures were carried out and from health care professionals. When a witness gave evidence no other parties were present. In the case of *Prendiville v. The Medical Council* [2007] I.E.H.C. 427, which concerned a finding of the Medical Council that the applicants in that case were guilty of professional misconduct, Kelly J. made the following observation about that non-statutory inquiry, in the course of setting out the factual background of the case before him:-

> *"It is clear that the judge, prior to finalising her report, followed a course which is now well established as a matter of fair procedures by tribunals of inquiry in cases such as this one. She furnished to persons to be criticised in the report a draft of that criticism in advance of its finalisation and publication. This was to enable such persons to make submissions and observations on that criticism before the final report was produced."*

It is apparent from the words "*in cases such as this one*" that the learned Judge was referring to non-statutory inquiries which were carried out in private.

7.4 Other inquiries include those carried out by inspectors appointed by this Court under the relevant provisions of the Companies Acts. Examples of these types of inquiries are the Ansbacher and National Irish Bank inquiries. The procedure for those inquiries was as follows: - initially inquiries were conducted in private and bank staff and customers were interviewed under oath; then the inspectors formulated draft findings or allegations which they circulated to parties that were adversely affected by them. Relevant parties could then request the inspectors to call witnesses who had given adverse evidence against them in order to cross-examine them or they could request that the inspectors call other witnesses. Submissions could then be made without knowledge or sight of the other parties' submissions. The inspectors then reached conclusions and published their report. It is clear that in these inquiries the inspectors did not circulate their draft final conclusions to the parties against whom adverse findings had been made for the purpose of them making further submissions.

7.5 The case of *Maxwell v. Department of Trade and Industry and others* [1974] 2 All E.R. 122, concerned an even more

limited form of inquiry under the Companies Acts in the U.K., than the kind as described above which take place in this jurisdiction. The inspectors conducted their inquiries in private and heard evidence from individuals. They then informed the persons in respect of whom adverse evidence had been given about the thrust of that evidence but did not provide them with a transcript of the evidence. No cross-examination of witnesses took place. The Court of Appeal found even in those circumstances that there was no obligation to furnish draft findings to those persons against whom adverse evidence had been given. Denning M.R. in considering what exactly fairness demanded when writing a report which was critical of a person reached the following conclusion at p.127:-

> *"Forbes J. [to whom the applicant had applied for an injunction to restrain the inspectors from proceeding with their investigation] thought that, in order to do what was fair, after hearing the evidence and studying the documents, the inspectors ought to come to a conclusion (which was necessarily tentative) and put the substance of that conclusion to the witness. He was led to that view by the observation of Sachs LJ in Re Pergamon Press Ltd [1970] 3 All ER at 544, [1971] Ch 405. I do not think that is right. Just think what it means. After hearing all the evidence the inspectors have to sit down and come to tentative conclusions. If these are such as to be critical of any of the witnesses, they have to re-open the inquiry, recall those witnesses, and put to them the criticisms which they are disposed to make. What will be the response of those witnesses? They will at once want to refute the tentative conclusions by calling other witnesses, or by asking for further investigations. In short, the inquiry will develop into a series of minor trials in which a witness will be accused of misconduct and seek to answer it. That would hold up the inquiry indefinitely. I do not think it is necessary. It is sufficient for the inspectors to put the points to the witnesses as and when they come in the first place. After hearing the evidence, the inspectors have to come to their conclusions. These need not be tentative in the least. They can be final and definite, ready for their report."*

8. Decision

8.1 Given the four sources of notification emanating from the tribunal, as described in para. 3 above, there is no question but that the applicants have had ample notice of the evidence that was of individual concern to them and there is no question but that they have had an ample opportunity to deal with it. That being so, the applicants have not satisfied me that they are in any way impeded in making submissions or in dealing with additional facts that arose in evidence concerning them. In my view, if the applicants know the evidence, they can address it and can deal with it, notwithstanding that it may be a burdensome task because of its large volume. The mere fact that this task is burdensome because of the extent of the inquiry and the evidence and written material it generated, cannot, in order to vindicate the applicants constitutional rights to fair procedures and natural justice, require that the applicant be given, as they demand in these proceedings, the provisional findings of the tribunal in so far as these affect them. There is no authority for a procedure such as this in the context of a full public inquiry. The applicants' apprehension that they would somewhat or entirely miss or misinterpret certain matters adverse to them or the significance of them, is in the context of the inquiry to date, the degree of disclosure, the nature of the matters under inquiry and the participation by them in person and through legal representation in the inquiry, somewhat unreal or unconvincing. I am quite satisfied that the applicants' rights to fair procedures have, at this point in the work of the inquiry, been fully vindicated. The point has now been reached in the inquiry when all the evidence has been heard and subject only to the consideration of the submissions of the affected parties on that evidence, nothing remains but to leave the tribunal alone to make its findings and recommendations (if any). It is in the nature of all courts and other fact finding tribunals that this ultimate stage must be reached, when the parties affected must let go and permit the tribunal to freely exercise its independent judgement in the adjudication on the evidence given in the light of the relevant submissions made.

8.2 The applicants appear to equate procedures under a tribunal of inquiry with procedures in litigation, where the pleadings set down a precise cause of action. In the instant tribunal there is no cause of action and there is no "*case*" to be answered by the applicants. What happens in a tribunal of inquiry such as this is an investigation of facts related to the subject matter of the inquiry, in the course of which evidence was given which potentially can affect prejudicially the reputations of the first four applicants. It is accepted that no evidence was given that had potentially prejudicial effects on the reputations of the last three applicants.

8.3 I am satisfied that there is no want of fairness by the tribunal in carrying out an inquisitorial process as compared to an adversarial one. Although the applicants may be left with a feeling of anxiety that they have missed something, the reality is that there cannot, in an inquisitorial process, be a similar yardstick against which to measure the evidence as there is in an adversarial process (*i.e.* in pleadings) as the nature of an inquisitorial process is fundamentally different. It is clear that in the instant case the applicants know the evidence that has been given and are in a position to address their submissions to those items of evidence that are adverse them. For this reason I am satisfied that there is no want of fair procedures or natural justice in the denial to them of the relief now sought.

8.4 The task of ascertaining the weight to be attached to the evidence is properly one for the decision-maker whose functions include assessing the credibility of witnesses. It is difficult to see what is to be achieved by providing draft findings in an inquiry such as this one where there was the fullest exploration of the available evidence relevant to the subject matter of the inquiry and in which the applicants availed of the full panoply of the In re Haughey rights such that there could, in my opinion, be no real apprehension but that the applicants are sufficiently well acquainted with all matters which arose in the evidence which affected them. At this stage in this inquiry the matter has moved well beyond the stage at which preliminary findings might be made in a different model of inquiry. In this inquiry the stage has now been reached for the tribunal having considered the submissions of the parties, to formulate final conclusions. What the tribunal must now do is make findings of fact based on the evidence it has heard. Such criticisms as may arise can only result from the findings of fact that will be made. Thus, seeking disclosure of these potential criticisms in the context of this inquiry at the stage it has now reached is inappropriate and futile. The relief now demanded by the applicants would in all likelihood result in a repetitious and unnecessary prolongation of the inquiry.

8.5 I am satisfied that the type of inquiry engaged in here is distinct from the other models of inquiry described above. In those inquiries, because of the manner in which evidence was initially assembled, *i.e.* in private and without cross-examination, it was necessary in the interests of natural justice to have a procedure which involved the communication of preliminary findings to affected parties to provide those parties with their only real opportunity to challenge the material assembled in the shape of evidence and preliminary finding, that was adverse to them. In stark contrast, in the instant

inquiry, all of this has already been accomplished through the procedures adopted by the tribunal as described above, so that the further step now demanded by the applicants is not necessary to vindicate their right to fair procedure and natural justice. Thus, whilst the applicants rely on the procedures followed in these other inquiries as a ground for arguing that they should apply in this inquiry, in my opinion, this reliance is misplaced. In fact, the difference between this inquiry and the non-statutory private model discussed above mandates the very opposite because, as indicated, the procedures adopted in this inquiry have the effect of affording a person affected by adverse evidence the opportunity from an early stage to avail of the full extent of the *In re Haughey* rights, whereas in these other types of inquiry, the disclosure of preliminary findings is an essential step to ensure fair procedures and for that reason has become a standard practice in those inquiries. Thus, I would respectfully agree with the judgment of Smyth J in *Murphy v. Flood* [2006] I.H.E.C. 75 and would adopt the reasoning expressed in the following passage from that judgment:-

> *"Furthermore, in arriving at its determination on the issues submitted to it, a Tribunal must have regard to the evidence and credibility of witnesses. Having heard the evidence and invited the submissions of the parties, there was not, in my judgement, any further necessity for the Tribunal to invite a further hearing on whether particular evidence or the lack of it or the conduct (of omission or commission) and the demeanour of a witness or witnesses fell within any particular category or range of credibility or in the spectrum of complete co-operation or non-cooperation amounting to obstruction and hindrance."*

8.6 I am also satisfied that the discovery cases of *Desmond v. Moriarty* [2004] 1 I.R. 334, *Haughey v. Moriarty* [1999] 3 I.R. 1 and *Bailey v. Flood* (Unreported, Supreme Court, 28th July, 1998) do not assist the applicants. The orders of discovery impugned in these cases were made without affording the affected parties an opportunity to be heard before the orders were made. The applicants here are in a wholly different position. They, as discussed above, have been heard to the fullest extent envisaged by the relevant constitutional requirements.

8.7 Accordingly, for the reasons set above I must refuse the reliefs sought in these proceedings.