**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2005 No. 1115 JR]**

**BETWEEN**

**DENIS O'BRIEN**

**APPLICANT**

**AND**

**MR. JUSTICE MICHAEL MORIARTY**

**(The Sole Member of the Tribunal of Inquiry into payments to Messrs. Charles Haughey and Michael Lowry)**

**RESPONDENT**

**Judgment of the Honourable Mr. Justice Quirke delivered the 21st day of December, 2005.**

1. This is an application for various reliefs by way of judicial review. With the agreement of the parties the application for leave to seek the relief has been treated by this Court as an application for the substantive relief claimed.

2. The reliefs sought can be divided into four categories. They are:

(1) Certain declaratory and injunctive reliefs arising out of

(a) the alleged failure on the part of the respondent to disclose within a reasonable time to the applicant the existence of a report, (into what has been called the "second G.S.M. phone competition"), which the Tribunal received from Mr. Peter Bacon and Associates in March, 2003 and allegedly relied upon in the conduct of its investigative process between March, 2003 and September, 2005,

(b) the stated intention of the respondent to hear, (and possibly rely upon), evidence of Mr. Bacon although Mr. Bacon has not been appointed by the respondent as an assessor pursuant to the provisions of s. 2(1) of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979 and

(c) the alleged reliance by the respondent upon assessments and reports provided by Mr. Peter Bacon and Associates in those circumstances.

(2) Certain declaratory and injunctive relief arising out of the alleged failure by the respondent to take appropriate and reasonable steps, either through the judicial system in Denmark or otherwise to bring Mr. Michael Anderson of Anderson Management International (hereafter "A.M.I") as a witness before the Tribunal.

(3) Certain declaratory relief arising out of the alleged failure on the part of the respondent to take any or any reasonable steps to bring certain persons who were at material times employed as executives or consultants with A.M.I. before the Tribunal and to seek relevant documents from A.M.I. for the purposes of the Tribunal.

(4) Declaratory relief arising out of a delay of some eighteen months which was allegedly authorised by the respondent between the direct testimony adduced by a witness, (Tony Boyle), and his cross-examination in respect of that testimony.

**RELEVANT FACTS**

3. The respondent is the sole member of a tribunal (hereafter "the Tribunal") established in September, 1997, pursuant to a resolution of the Oireachtas which deemed it "*…expedient that a tribunal be established under the Tribunals of Inquiry (Evidence) Act, 1921, as adapted by or under subsequent enactments and the Tribunal of Inquiry (Evidence) (Amendment) Act, 1979 to inquire urgently into and report to the Clerk of the Dáil and make such findings and recommendations as it sees fit in relation to"* …stated matters of urgent public importance.

4. Pursuant to its terms of reference the Tribunal was charged inter alia to inquire into the following;

*(e) whether any substantial payments were made directly or indirectly to Mr. Michael Lowry…during any period when he held public office in circumstances giving rise to a reasonable inference that the motive for making the payment was connected with any public office held by him or had the potential to influence the discharge of such office……..*

*(d) whether Mr. Lowry did any act or made any decision in the course of any ministerial office held by him to confer any benefit on any person making a payment referred to in para*

*(e) or any person who was the source of any money referred to in para*

*(f) or on any person in return for such payments being made or procured or directed any other person to do such act or make such decision."*

5. The applicant is a businessman who was at all material times chairman of Esat Digifone Ltd, the company which successfully competed for and secured the "second G.S.M. phone licence", from the Government in 1995.

6. The first public sittings of the Tribunal which dealt substantively with the terms of reference applicable to Mr. Michael Lowry commenced in June of 1999 and continued for a period of approximately five days. They resumed on 18th December, 1999, continued, (a), until March of 2001 and, (b), intermittently for a short period thereafter. In May, 2001, the Tribunal began hearing evidence in public concerning a number of financial and property transactions which appeared to involve Mr. Lowry and to connect him with certain payments and loans.

7. On 14th June, 2001, the Tribunal by way of an opening statement indicated an intention to conduct a wide ranging inquiry into the public offering of shares in ESAT Telecom in 1997. This investigation continued throughout the remainder of 2001 and the best part of 2002. It included the investigation of a transaction known as the *"Doncaster Transaction"* which was associated with the applicant.

8. A letter published in the *Irish Times* on the 25th September, 1998, suggested an involvement by Mr. Michael Lowry in the *"Doncaster Transaction".*

9. Mr. Michael Lowry was, in April, 1995 and at the times material to the Tribunal's investigation, the Minister for Transport, Energy and Communications. He was, accordingly, the Minister responsible for the award of the second G.S.M. phone licence in 1995.

10. Because it appeared to the Tribunal that both the applicant and Mr. Michael Lowry appeared to be connected with the award of the second G.S.M. phone licence and with a series of financial and property transactions the Tribunal commenced what is described as *"extensive inquiries into the G.S.M. 2 process"* on 3rd December, 2002.

11. The Tribunal has now heard evidence about the process from 62 witnesses over 130 days of public sittings. It has also carried out extensive private investigations into the process.

12. A dedicated project team (hereafter the "PTGSM.") had been established by the Irish Government. It was charged with responsibility for designing and implementing an evaluation process intended to enable the Irish Government to choose the most suitable candidate for the award of the "second G.S.M. phone licence". The successful candidate emerging from that evaluation process would then be entitled to negotiate for the award of the licence.

13. The members of the PTGSM were senior civil servants drawn from the Department of Transport, Energy and Communications and from the Department of Finance.

14. In April, 1995 Andersen Management International (hereafter A.M.I.), which is a company incorporated in Denmark, successfully tendered for what was described as "*Tailor made expert and consultancy services in connection with the evaluation and licence award to an operator to install and operate a second G.S.M. network in Ireland*". It commenced its work immediately.

15. A.M.I. had participated in processes leading to the award of over 120 mobile telephone licences in 48 separate jurisdictions prior to 1995. It was founded by Michael Andersen, a Danish economist who had worked extensively in the telecommunications sector and had formerly been employed by the Office of the Danish Telecommunications Regulator.

16. A.M. I, as the successful tenderer, began to provide expert consultancy services to the PTGSM in April, 1995. Michael Andersen and his associates began to advise and guide the PTGSM on all aspects of the evaluation process including;

> *(i) the design of the evaluation model,*
>
> *(ii) the design of the weighting process,*
>
> *(iii) the preparation of the first draft licence,*
>
> *(iv) the design of the timetable for the competition process,*
>
> *(v) the amendment of the evaluation model,*
>
> *(vi) the format of the oral presentations held on the 12th to 14th September, 1995,*
>
> *(vii) the creation of sub-groups,*
>
> *(viii) the drafting and production of the evaluation report,*
>
> *(ix) a large number of associated matters and*
>
> *(x) a wide range of advice to the Department of Transport, Energy and Communications (hereafter* "The Department") *on a variety of different matters.*

17. Messrs Jon Bruel, Marius Jacobsen, Ole Feddersen, Michael Thrane, Tage Iversen and Mikel Vinter were amongst the executives and consultants from A.M.I. who participated in the provision of the services required.

18. 10.There were six applicants for the second G.S.M. phone licence. The evaluation process comprised a competition. On 25th October, 1995, it was announced that Esat Digifone (which had been designated "A5" by the PTGSM) was the winner of the competition and was therefore entitled to negotiate for the award of the licence.

19. Between 25th October, 1995, and the 16th May, 1996 Esat Digifone participated in a licence negotiation process. It was successful in securing the "second GSM phone licence".

20. A.M.I. provided additional services to the Department during the negotiation process.

21. During the course of its private investigation into the evaluation process the Tribunal wrote to A.M.I. on 19th June, 2001, indicating that:

> *"The Tribunal apprehends that you may be able to provide it with assistance in connection with its inquiries concerning the second Irish G.S.M. licence (1995/1996) and, in particular in connection with the setting up of and the conduct of the competition to evaluate the bids for the licence."*

22. Michael Andersen, at the invitation of the Tribunal travelled from Denmark. He attended five private meetings with the Tribunal. One of those meetings, on 7th February, 2002, was also attended by Michael Thrane of A.M.I.

23 A.M.I. provided an initial report to the Tribunal which outlined the evaluation process. In June, 2002 solicitors on behalf of A.M.I. informed the Tribunal that Michael Andersen had sold his interest in A.M.I. in June, 2002 to Merkantildata Ltd, a Norwegian company which was seeking certain guarantees from the Tribunal.

24. The Tribunal was not in a position to provide the guarantees sought to secure the attendance of Michael Andersen to provide assistance to the Tribunal.

25. Thereafter Michael Anderson was in dispute with Merkantildata in relation to its acquisition of A.M.I. and indicated to the Tribunal that throughout the duration of that dispute he would not be in a position to assist the Tribunal.

26. The dispute became the subject of arbitration and in a letter dated the 7th February, 2003 the solicitors on behalf of Michael Anderson advised that Mr. Anderson *"…had nothing against giving evidence to the Tribunal when the said issue (between him and A.M.I. – Merkantildata) has been resolved."*

27. The Tribunal made strenuous further efforts to secure the attendance of Michael Anderson throughout 2003 and ultimately secured Mr. Andersen's agreement to meet with members of the Tribunal's legal advisers in Copenhagen on Wednesday 29th October, 2003. That meeting was made subject to a confidentiality agreement in relation to its contents.

28. At the meeting Michael Anderson, (who had earlier sought from the Tribunal an indemnity in relation to his costs and the postponement of his testimony until after the completion of the arbitration), said that he was now seeking an indemnity from the State in respect of any claims against him, whether direct or indirect arising out of either (a) the evidence which he might adduce before the Tribunal and (b) any proceedings connected with the process leading to the granting of the second G.S.M. licence. He said that the indemnity would have to extend to Merkintildata (who were then the owners of A.M.I).

29. Arising out of that meeting and the demand from Michael Andersen for an indemnity the legal advisers of the Tribunal met with officials of the Department of the Taoiseach on the 2nd February, 2004, to discuss the indemnity sought.

30. Subsequently a request was made by the Tribunal to the Government seeking the indemnity on behalf of Michael Anderson.

31. The Attorney General and the Tribunal independently sought legal advice as to the possibility of compelling Michael Anderson to attend within this jurisdiction for the purpose of testifying or alternatively whether a procedure was available whereby Michael Anderson on request from the Irish Authorities could be compelled by the courts in Denmark to attend and give evidence before a Danish court.

32. There followed a series of exchanges between the Tribunal, the Government and Mr. Oluf Engell (of Hjejle, Gersted and Mogensen which is a firm of Danish lawyers). The exchanges, comprising correspondence, legal opinions, meetings and discussions were directed towards the objective of compelling Michael Andersen to provide evidence to the Tribunal either within this jurisdiction or through the courts in Denmark.

33. Finally Mr. Engell attended a consultation with the respondent and the Tribunal's legal advisers. The advice given by Mr. Engell to the Tribunal at that consultation was summarised in a letter dated 7th April, 2005, addressed to Mr. Engell. He confirmed the accuracy of the summary which provided *inter alia* that:

> (1) An application seeking to compel Michael Andersen to testify before a Danish Court, if approved by the Danish Ministry for Justice would be referred initially to the Danish Court of First Instance. At that stage it would be open to Michael Andersen to challenge the application. If unsuccessful he would then be entitled to exercise a right of appeal to the High Court, and, thereafter, subject to certification (by the Danish Special Commissioners), to the Supreme Court.
>
> > That process in Denmark could take upwards of three years to complete if, as anticipated, Michael Andersen availed of the appellate process. Michael Andersen is not compellable to testify within this jurisdiction.
>
> (2) At a hearing of the type contemplated before the Danish courts cross-examination, as understood by the Irish courts, is not permitted. No verbatim record of the proceedings is kept and the court does not permit the making of recordings or transcripts of proceedings. The sole record of the proceedings is a note kept by the presiding judge. The note comprises the judge's understanding or impression of the answers provided by the witness.
>
> (3) A witness before a Danish court is entitled to invoke privilege against self-incrimination which is not limited to criminal self-incrimination. It extends to self-incrimination in the context of potential civil liability (or "potential exposure to economic damage").
>
> (4) Upon receipt of the foregoing advice from Mr. Engell the Tribunal concluded that there was no realistic prospect of securing Michael Andersen's evidence through procedures before the Danish courts.

34. The Tribunal accepted Mr. Engell's advice and so advised the Government.

35. The Government decided that it would not grant Mr. Michael Anderson the indemnity which he sought. The Tribunal informed Michael Andersen of the Government's decision. He did not respond (although notified that in the absence of a response from him the Tribunal intended to proceed with its public hearings).

36. On 28th November, 2002, the Tribunal and its legal advisers met with Mr. Peter Bacon who is an economist with a background in government service. Mr. Bacon had experience of competition processes including a number of such processes in the Telecoms/I.T. area.

37. By letter dated the 13th December, 2002, the Tribunal provided Mr. Bacon with a briefing document which identified specific issues upon which the Tribunal sought the opinion of Mr. Bacon and his associates. The briefing note contained an *"overview of the evaluation process and the documentation provided"*, which described the evaluation process undertaken by the PTGSM insofar as that was understood by the Tribunal.

38. Under the heading *"issues"* the briefing note identified the specific issues on which the Tribunal sought Mr. Bacon's opinion. He was asked a series of questions under various headings. The questions were largely technical in nature and, in the main sought Mr. Bacon's opinion as to the adequacy of the process and the methodology which was adopted. Mr. Bacon's attention was drawn to the fact that initially a quantitative evaluation system had been chosen by the PTGSM. This had gradually been replaced by a qualitative evaluation system which in turn was replaced by a "holistic" evaluation.

39. The gradual change from quantitative to *"holistic"* had been described as *"a withering"* by A.M.I. in an appendix to a final evaluation report.

40. Mr. Bacon was asked for his opinion as to whether the explanation provided in the appendix to the evaluation report was *"credible*", having regard to the information available to the evaluators at the time.

41. The briefing note continued:

> *"It is clear that both versions of the quantitative evaluation give a different ranking of the top three applicants than the final report. Does this undermine at all the veracity of the findings in the final report? Why was there such a discrepancy between the result of the quantitative evaluation and the result of the qualitative evaluation? Does this imply that the indicators chosen for the quantitative evaluation were incorrect or did not give an accurate reflection? Was the quantitative evaluation as unworkable as A.M.I. ultimately stated? Can the evaluation process continue after the collapse of the quantitative?."*

42. Under the heading *"Financial Strengths of Communicorp"* Mr. Bacon was asked *inter alia*:

> *"Please explain how ESAT Digifone could be awarded a D for solvency but a B for financial strength.…how, in general terms, could ESAT Digifone have received an overall B grade for financial key figures given its inherent financial weakness?*
>
> *Were the concerns repeatedly expressed by, amongst others, Mr. Billy Riordan and Mr. Donal Buggy justified? What grade should ESAT Digifone have been awarded for financial strength having regard to all the circumstances, including the manner in which the other applicants were graded…".*

43. There was a further exchange of documentation between the Tribunal and Mr. Bacon including the provision by Mr. Bacon to the Tribunal of a documents entitled "proposal to undertake a review of specified elements of the tender appraisal process used in the award of the second G.S.M. licence".

44. On 10th February, 2003, Mr. Bacon and his associate met with the Tribunal's legal advisers.

45. On the 18th March, the Tribunal received an email from Mr. Bacon. It contained a draft copy of his report. The report was comprehensive in nature.

46. Under the heading *"Conclusions"* it advised the Tribunal that:

> (a) the mathematical procedures applied to the scoring system were: *"totally invalid conceptually"* ,
>
> (b) the mixture of quantitative and qualitative elements *"does not comply with what would generally be considered to be good practice"*,
>
> (c) if the conditions imposed by the evaluation team were not adhered to then *"…. The award of the licence to A.5 was in direct contravention of the recommendations of the evaluation team..."*
>
> (d) that *"…the arguments that are put forward in respect of a number of key decisions – the withering of the quantitative analysis, the non-scoring of the insolvency, the limited use of sensitivity analysis, the final ranking on the basis of assigning cardinal properties to interval scorest are not convincing."* and
>
> (e) *"these issues lead the consultants to the conclusion that the ranking that was derived on the basis of the results of this evaluation process, particularly in the light of the very tight result, cannot be sustained on the basis of the evaluation. Even small adjustments to the scoring are sufficient to eliminate the difference between the top two applications. That this sensitivity was not considered is a serious flaw in that process. Furthermore at best, the evaluation provided only a conditional recommendation and not a definitive result."*

47. On the 26th March, 2003, the Tribunal wrote to Michael Andersen's Irish solicitors informing them that the Tribunal had received *"expert assistance*" which indicated that the evaluation report prepared by Michael Andersen *"may contain a number of seriously fundamental flaws*."

48. On 31st March, 2003, the Tribunal's legal adviser met with Mr. Bacon and his associate to discuss the evaluation process. The notes of that meeting record that Mr. Bacon stated:

> *"Everything points to Andersen having been manipulated. He was pushed around. He was the servant of the steering group. Who took the decisions to move from numbers to letters? Think it was Andersen. Can't add soft scoring and you can't weight it. Why did he back away from the quantitative?."*

49. On the day following that meeting Counsel for the Tribunal made an unannounced statement (described as a "Supplementary Opening Statement") which appears to have derived from the report which the Tribunal had received from Mr. Bacon the previous day and from advice and information which was made available to the Tribunal from Mr. Bacon.

50. Between the 31st March, 2003, and 13th September, 2005, 17 civil servant witnesses testified before the Tribunal. It is contended on behalf of the applicant that those witnesses were cross-examined on behalf of the Tribunal in a manner intended to undermine and to call into question the evaluation process.

51. Two witnesses including Mr. Martin Brennan (who was then Chairman of the PTGSM) who had testified earlier were recalled and cross-examined. It was contended on behalf of the applicant that the cross-examination was based upon questions derived from the

reports and advice of Mr. Bacon.

52. The Tribunal first met with Mr. Bacon on 28th November, 2002. It received the draft 58 page report from Mr. Bacon on 18th March, 2003. The accompanying email requested a meeting in order to *"finalise the report"*. The final report from Mr. Bacon was submitted to the Tribunal on the 31st March, 2003. It was in the precise terms of the draft report.

53. Thereafter there was no contact between the Tribunal and Mr. Bacon until the latter attended a private meeting with the Tribunal on 3rd June, 2004.

54. On 30th August, 2004, the Tribunal wrote to Mr. Bacon seeking a report from him comprising what was in effect, a summary of his proposed direct evidence to be adduced at a public sitting of the Tribunal.

55. A 28 page report was furnished directly to the Tribunal on 18th January, 2005. It was forwarded to the applicants solicitors on 16th March, 2005

56. Prior to the 16th March, 2005, the applicant had not been aware that there had been contact between the Tribunal and Mr. Bacon.

57. The letter accompanying the report indicated that the Tribunal *had "…not as yet conclusively determined whether to adduce the contents of this report in evidence…"* . It sought the views of the applicant on that issue.

58. The applicant's solicitors replied expressing the view that the report did not constitute evidence and was not admissible. It concluded *"…the purpose of the Tribunal carrying out such an exercise is entirely unclear to our client."*

59. Arising from other correspondence (relating to the availability of Michael Andersen), the Tribunal furnished three folders of documents to the applicant's solicitors on 31st August, 2005. One of the documents was a letter from the Tribunal to Michael Andersen's solicitors dated 26th March, 2003, which provided *inter alia*:

> *"The Tribunal has obtained some expert assistance for the purpose of scrutinising the report and this has confirmed the Tribunals tentative view that the report appears to be flawed in a number of ways and indeed may contain a number of seriously fundamental flaws."*

60. The applicant's solicitors sought information in relation to the *"expert assistance"*. On the 1st September, 2005, the Tribunal supplied the applicant's solicitors with a further folder of documents. Included was the 58 page report provided by Mr. Bacon to the Tribunal in March, 2003. Prior to the 1st September, 2005, the applicant and his solicitors had not been aware of the existence of that report.

61. Following correspondence between the applicants solicitors and the Tribunal between 1st September, 2005 and the 27th September, 2005, the applicant's solicitors were provided on 27th September, 2005, with five files of documents and seven floppy disks which related to the Tribunals' dealings with Mr. Bacon and his associates.

62. On 30th March, 2005, the Tribunal advised Mr. Bacon that he would be required to testify before the Tribunal. On the 25th July, 2005, the Tribunal confirmed that requirement and advised Mr. Bacon that he would be required to testify on the resumption of the Tribunal's sittings in September.

63. On 16th August, 2005, he confirmed his availability to the Tribunal.

64. On 13th September, 2005, Counsel on behalf of the applicant made submissions which included an objection to the reliance by the Tribunal upon Mr. Bacon's report. The grounds primarily relied upon were that the reports had not been disclosed to the applicant and that their non-disclosure comprised a breach of the applicants right to fair procedures.

65. Having received the additional documentation from the Tribunal's legal advisers the applicant's solicitors wrote to the Tribunal on 28th September, 2005, requesting the Tribunal to desist from making a ruling in respect of the earlier submissions until the applicant could avail of the opportunity to consider the material provided on 27th September, 2005. The Tribunal replied on the following day and declined the request.

66. On 29th September, 2005, the respondent delivered a detailed and comprehensive ruling. He outlined the history of the Tribunal's investigation into the award of the GSM phone licence including detail as to how Mr. Bacon came to be retained to advise the Tribunal. He described the vigorous efforts made by and on behalf of the Tribunal to secure the attendance of Michael Andersen to testify before the Tribunal. He rejected the various submissions made on behalf of the applicant. He provided detailed reasons for his decision.

**THE APPLICANT'S CLAIM**

67. The Applicant claims relief on four distinct grounds. They are:

1. (a) that by retaining Peter Bacon as an expert witness the respondent acted unlawfully and *ultra vires*,

   (b) that the failure to disclose Peter Bacon's report and advices to the applicant comprised a breach by the respondent of the applicant's constitutionally protected right to fair procedures and,

   (c) that the doctrine *nemo iudex in sua causa* precludes the respondent from hearing evidence from Peter Bacon.

2. That by failing to take additional steps to seek the evidence of Mr. Michael Andersen through the Danish court system the respondent has;

   (a) acted irrationally,

   (b) acted in breach of the doctrine of proportionality and,

   (c) has failed to provide the applicant with fair procedures, contrary to the principles of natural and constitutional

justice.

3. That by failing to seek relevant documents from A.M.I. and the evidence of John Bruel, Michael Thrane, Ole Feddersen, Marius Jacobson, Tage Iversen and Mikel Vinter the respondent has;

(a) acted irrationally,

(b) acted in breach of the doctrine of proportionality and

(c) deprived the applicant of fair procedures contrary to the principles of natural and constitutional justice.

4. That by permitting a period of 18 months to elapse between the direct testimony adduced by Mr. Tony Boyle and his cross-examination in respect of that testimony, the respondent has deprived the applicant of fair procedures and has acted in breach of the principles of natural and constitutional justice.

**1. (a) Peter Bacon "Expert witness" or "Assessor**".

68. Mr McGonigal S.C submits that the Oireachtas appointed the respondent as the sole member of the Tribunal. It was empowered to appoint an assessor to the Tribunal but did not do so.

69 He argues that it was open to the respondent to request the Oireachtas to exercise the power conferred upon it by s. 2 of the Act of 1979 to appoint an assessor. He did not do so.

70. He submits that the appointment of an assessor would have achieved the objective sought by the Tribunal. An assessor equipped with appropriate skills and expertise would, he says, have been able to provide the required advice and assistance to the Tribunal.

71. He argues that the Tribunal was confined to that remedy if it wished to obtain expert advice upon matters of particular technicality or complexity.

72. Section 2 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979, provides as follows:

*"2 (1) A tribunal may consist of one or more than one person sitting with or without an assessor or assessors appointed by the instrument appointing the tribunal or any instrument supplemental thereto.*

*(2) An assessor appointed under this section shall not be a member of the tribunal in relation to which he is so appointed."*

73. Its provisions were considered by the Law Reform Commission Consultation Paper on Public Inquiries including Tribunals of Inquiry, LRC CP 22 - 2003 (Dublin, 2003).

74. Pointing to the fact that the role of an assessor is not defined in the Act the report observed, (at para. 5.48), that:

*"The precedents mentioned at para. 5.46 (Whiddy and Stardust) suggest that an assessor will generally be a person with a special expertise who is presumably appointed in order to give advice and assistance to the Tribunal, which is comprised of a layman from that perspective of the technical matters involved. It can thus be assumed that the Assessor influences the Chairperson. Strictly speaking, on a very literal construction, there might have been a violation of a general principle mentioned earlier, unless the existence of an assessor had been expressly provided for in the legislation."*

75. The Rules of the Superior Courts also permit the appointment of assessors by the Courts (see Order 36, Rule 41 of the Rules of the Superior Courts).

76. Delivering his ruling on 29th September, 2005, the respondent explained *inter alia* that:

*"…I will indicate in broad terms how Mr. Bacon became involved with the Tribunal.…during the Tribunal's private examination…the Tribunal's grasp of technical matters (i.e. technical aspects of the process as opposed to the technical aspects of cell-phone technology) was informed by assistance and guidance provided by the officials involved in the PTGSM and by Mr. Michael Andersen and one of his colleagues. I was anxious to ensure that the approach being adopted was not based on a simplistic appreciation of the technical aspects of the evaluation. For this reason Mr. Bacon's services were retained. By that time, the Tribunal's appreciation of the technicalities of the evaluation was quite highly developed.*

*Mr. Peter Bacon's first report arose from information identified by the Tribunal. Once his report was received in or about March of 2003, the question of whether it would be necessary to introduce expert evidence was considered. A decision on that matter was deferred at that point. Having concluded the bulk of the technical evidence in relation to the GSM process, it was considered desirable to have the assistance of an expert. The Tribunal's request to Mr. Bacon for a report to be introduced at public hearings as expert evidence by him was based on the lines of inquiry developed by the Tribunal and on his Report of March 2003.*

*It is my view, therefore, subject to any submission which may be made, that if conclusions are to be drawn having regard to the line of questioning pursued by the Tribunal in dealing with technical matters, it would be of value to have the evidence of an expert.*

*I understand Mr. Bacon to be an expert in this area. Like Mr. Andersen, he is an economist by training with, like Mr. Andersen also, a background in government service. While he has not conducted a*

*competition of the GSM II type, i.e. a competition to identify a first private enterprise competitor to a Semi-State organisation in a particular communications arena, he has experience of competition processes, including a number in the Telecoms/IT area. He has not been asked to conduct an audit of the GSM II process. Nor has he been requested to*

*examine the evaluation with a view to concluding whether the correct result was reached by the evaluators. He has however examined aspects of the evaluation methodology and the way in which the methodology was applied. He has been directed to and has agreed to provide responses to the number of questions crafted along the lines of the questioning pursued with officials involved in the PTGSM. It is important that his evidence, if adduced should be subject to scrutiny by Counsel for those persons likely to be affected by any conclusion which could be critical of the process and in particular by Counsel for the Department.".*

77. Undeniably the Oireachtas was empowered to appoint an assessor to sit with the respondent but did not do so. It has not been disputed that the respondent did not request the Oireachtas to appoint an assessor to sit with him.

78. It is clear from his ruling that the respondent was satisfied that he was empowered to retain the services of persons with particular skills in order to advise the Tribunal on technical aspects of the Tribunal's work.

79. He was also satisfied that he was empowered, if he considered it necessary and appropriate, to call such persons as expert witnesses during public sittings of the Tribunal, where they could be subjected to cross-examination by the parties having an interest in the work of the Tribunal.

80. Whether he was so empowered has been vigorously challenged.

81. The reason for the establishment of the Tribunal was to inquire urgently into matters which were deemed to be of *"urgent public importance"* and to *make "such findings and recommendations as it sees fit…."*.

82. The respondent in his ruling stated that:

*"The tribunal is not engaged in an adversarial contest with persons affected who are likely to be affected by evidence given at its public hearings. Nor is it engaged in an adversarial contest with witnesses testifying at those public hearings. The Tribunal is engaged in a fact finding exercise. The presentation of the evidence directed to that end is a matter solely for me.*

*The private investigative phase of the Tribunal's work enables me to arrange and to configure material for presentation at the Tribunal's public hearings in a way which is best suited to achieving the ends set out in the Tribunal's Terms of Reference. The fact that in the course of the private investigative work I may have obtained some assistance in considering the material does not mean that I have substituted the views of expert or others of my own views. By reason of my training and experience as a Barrister and as a Judge I am keenly aware of the differences between evidence upon which my determinations must exclusively be based and any other information I may have obtained in the course of the private investigations I have carried out or otherwise."*

83. On the facts as outlined earlier, all reports and documents submitted by Mr. Bacon and his company to the Tribunal have now been disclosed to the applicant who will be entitled:

(a) to make such submissions he may deem appropriate to the Tribunal in respect of that documentation,

(b) to require that Mr. Bacon and/or his associates are called by the Tribunal so that they can be cross-examined in respect of the information which they have provided to the Tribunal and,

(c) to adduce such additional or other evidence as they deem appropriate in order to rebut or challenge or otherwise deal with the testimony of Mr. Bacon and his associates.

84. Accordingly it can be argued with some force that the so-called *"Re Haughey"* rights of the applicant have been largely preserved and protected.

85. Whether that is sufficient in the circumstances of this case will be considered later in the context of the provision of fair procedures and constitutional justice to the applicant.

86. It is, however, of relevance also to the question whether the Tribunal was empowered to retain the services of Mr. Bacon in the manner and for the purposes described in the respondent's ruling.

87. By making legislative provisions for the appointment of assessors to assist decision making bodies by way of expert advice and assistance the Oireachtas has implicitly acknowledged the necessity for and capacity of decision making bodies to distinguish between

(a) advice and assistance which they receive from assessors and

(b) sworn or other expert evidence upon which they can rely in support of findings which they may make.

88. The respondent, in his ruling, has expressly referred to his capacity in that respect in the following terms:

*"... By reason of my training and experience as a Barrister and as a Judge I am keenly aware of the differences between evidence upon which my determinations must exclusively be based and any other information I may have obtained in the course of the private investigations I have carried out or otherwise."*

89. The appointment of an assessor might well have achieved the objective sought by the Tribunal. An assessor equipped with appropriate skills and expertise would, presumably, have been able to provide the required advice and assistance to the Tribunal. The respondent did not request such an appointment.

90. The applicant argues that the respondent was confined to that remedy if he wished to obtain expert advice upon matters of particular technicality or complexity. I do not understand why that should be so.

91. The respondent made a conscious decision to take another course. The assistance required was discrete and technical in nature. I can see no immediate reason why the Tribunal was not empowered, during its preliminary private investigation, to interview persons having particular technical competence or skills for the purpose of acquiring greater understanding of technical matters relevant to

the Tribunal's investigation. I can see no reason either why the Tribunal should not be entitled to pay the reasonable expenses and professional fees associated with the provision of such professional information and advice.

92. Provided that the advice and information is disclosed to the parties having an interest in the Tribunal's work I can see no reason why the Tribunal should not be entitled to call such professional witnesses to testify at public sittings. Should the Tribunal opt not to call such an expert witness to give evidence at public sittings it should, upon request, make the witness available in order to be subjected to cross-examination.

93. The applicant says that the appointment of Mr. Bacon as an assessor pursuant to the provisions of the Act of 1979 for the purpose of providing expert advice and assistance to the Tribunal would have been valid, lawful and appropriate.

94. It is not immediately apparent how the interests of the applicant would have been as assisted by such an appointment.

95. It is true that the applicant would have been aware that an assessor was providing expert advice and assistance to the Tribunal. However the applicant would not have been entitled to have access to the expert advice and assistance provided by the assessor to the respondent.

96. As has been pointed out by the Law Reform Commission the fact that an assessor, so appointed, can influence a decision making body such as the Tribunal, can, itself, give rise to difficulties.

97. By retaining the services of an expert witness and making that expert witness available for cross examination the respondent has provided for the applicant far greater and wider rights than would have been available to him had an assessor been appointed to assist the Tribunal. The applicant will now be able to probe, test, challenge and, if necessary, condemn the expert advice provided to the Tribunal by Mr. Bacon by way of cross-examination and by adducing evidence in rebuttal. He would not have been able to challenge the expert advice of an assessor in that manner.

98. If, as the applicant concedes, the appointment of an assessor would have been lawful and appropriate in the circumstances, a measure which afforded greater rights to the applicant can hardly be deemed unlawful, particularly since it has not been precluded by any statutory or other legislative provision.

99. I am satisfied therefore, that by retaining Mr Bacon to advise the Tribunal the respondent did not act unlawfully or *ultra vires*.

**1. (b) Peter Bacon "Non-disclosure**"

100. The Tribunal first met with Mr. Bacon on 28th November, 2002, during its preliminary investigation of relevant evidence. Following a number of further meetings it received a draft 58 page report from Mr. Bacon on 18th March, 2003.

101. The accompanying email requested a meeting in order to *"finalise the report"*

102. The final version of that report was submitted to the Tribunal on the 31st March, 2003. It was in the precise terms of the draft report.

103. Thereafter there was no contact between the Tribunal and Mr. Bacon until the latter attended a private meeting with the Tribunal on 3rd June, 2004.

104. On 30th August, 2004, the Tribunal wrote to Mr. Bacon seeking a report from him comprising what was in effect, a summary of his proposed direct evidence to be adduced at a public sitting of the Tribunal.

105. A 28 page report was furnished directly to the Tribunal on 18th January, 2005. It was sent to the applicant's solicitors on 16th March, 2005.

106. The Tribunal has now indicated that it intends to call Mr. Bacon to give relevant evidence (in the terms summarised in the report), at public sittings of the Tribunal.

107. The applicant claims that he has not been afforded fair procedures and has been unfairly disadvantaged by the Tribunal's failure to disclose until the 1st September, 2005, the fact that it had retained the services of an expert advisor in November, 2002 and had received a comprehensive 58 page report from that expert in March, 2003, which was critical of Michael Anderson, the evaluation process and some members of the PTGSM.

108. The Tribunal subsequently heard evidence from 17 civil servant witnesses including members of the PTGSM. Those witnesses were, apparently, cross examined on behalf of the Tribunal using information contained within the report.

109. Two of the principal civil servant witnesses, including the chairman of the PTGSM, were recalled in evidence and cross examined on matters and criticisms derived from the report.

110. Mr. McGonigal SC on behalf of the applicant says that by failing to disclose the report provided by Mr. Bacon in March, 2003 and the earlier advice of Mr. Bacon the civil servant witnesses and the applicant were denied fair procedures because they were not advised of the damaging allegations contained within Mr. Bacon's report and of his advice to the Tribunal. Accordingly, he says, they were not afforded the opportunity to deal with grave allegations of serious misconduct which had been made against them.

111. The Tribunal has been established by the Oireachtas to inquire into a particular matter of urgent public importance and to prepare a report and make recommendations based on facts established in public hearings of the Tribunal. Its functions are different from those of a court of law.

112. The Tribunal in this case is empowered, (and indeed required), to conduct a preliminary investigation of evidence and, where appropriate to interview witnesses in private for that purpose. It is also empowered, (and required), to determine what evidence it considers relevant to the matters which it is required to investigate. It is entitled to determine what, if any, evidence should be adduced during public sittings.

113. The respondent has pointed out that the inquiry upon which he has embarked is inquisitorial in nature and not accusatorial as would be the case in civil and criminal proceedings before the courts. In civil or criminal court proceedings it would not be appropriate

for a court to interview witnesses in private in advance of a hearing and then to proceed to adjudicate upon issues affected by the testimony of such witnesses. The Tribunal, however, is a fact-finding body which has been established and authorised by the Oireachtas to do precisely that.

114. Accordingly, whilst the procedures afforded to persons whose interests are affected by the findings of tribunals of inquiry must be fair, they will, of necessity, not be identical to the procedures provided in court proceedings.

115. That is not to say that the procedures to be provided to parties coming before a tribunal should be any less robustly protective of the rights of participants than persons coming before the courts (see the judgment of the Supreme Court (Hardiman J.) in Maguire v. Ardagh [2002] 1 I.R. 385).

116. In *Kiely v. Minister for Social Welfare* [1977] I.R. 267 at p. 281 the Supreme Court (Henchy J.) observed:

> *"… Article 40.3 of the Constitution implies a guarantee to the citizens of basic fairness of procedures. The rules of natural justice must be construed accordingly. Tribunals exercising quasi-judicial functions are frequently allowed to act informally – to seek unsworn evidence, to act on hearsay, to depart from the rules of evidence, to ignore courtroom procedures, and the like – that they may not act in such a way as to imperil a fair hearing or a fair result. I do not attempt an exposition of what they may not do, to quote the frequently-cited dictum of Tucker L.J. in Russell v. Duke of Norfolk (1949) 1 ALL. B.O. 109, 118, 'there are, in my view, no words which are universal application to every kind of inquiry and every kind of domestic Tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the Tribunal is acting, the subject-matter that is being dealt with, so forth'."*

117. In March, 2003, it was the intention of the Tribunal to call Michael Anderson as a witness to testify at public sittings of the Tribunal. No decision had then been made to hear Mr. Bacon's evidence. Although the Tribunal had apparently, of its own volition, reached a "tentative" conclusion that the evaluation process might have been flawed, that view had not been tested at interview with Michael Anderson.

118. In those circumstances I do not consider that there was an obligation upon the Tribunal to disclose to the applicant its reservations as to the adequacy of the evaluation process and the nature and extent of those reservations.

119. It was engaged in a fact-finding inquiry. It had not reached final conclusions. If it harboured suspicions, (and it had not necessarily done so), then it was not obliged to divulge to the applicant the nature and extent of such suspicions. Its task was to investigate material and evidence which it considered relevant to its inquiry in a fair and open manner.

120. Whilst the Tribunal's inquiry is inquisitorial in nature it is now well settled that a significant duty of disclosure attaches to tribunals which are inquisitorial in nature. The rights and interests of the applicant may be fundamentally affected by findings and recommendations made by the Tribunal in its report. His interests may also be affected by the public nature of the Tribunal's hearings and the publicity which they attract.

121. The duty of disclosure which rests upon the Tribunal includes disclosure of witness statements made to tribunals sought by parties seeking to cross examine (see *O'Callaghan v. Judge Alan Mahon and Others* (Unreported Supreme Court, 9th March, 2005)).

122. I am satisfied that it extends also to documents obtained by a tribunal of inquiry by way of expert professional advice upon which a tribunal itself intends to rely in evidence.

123. Reference has been made to a significant body of case law dealing with the duty of disclosure which rests upon decision makers to disclose to all parties having an interest in the decision, any expert or other advice or information received by the decision maker which is relevant to the matters in issue.

124. Such a duty certainly exists – See *Georgopolous v. Beaumont Hospital Board* [1998] 3 I.R. 132, *Errington v. Minister for Health* [1935]1. K.B.249, *R v. Secretary of State for Health Ex-parte United States Tobacco International Inc*. [1992]1 ALL E.R. 212 and many others.

125. However the duty identified in the authorities just cited can be summarised as comprising the principle identified and "*unreservedly*" accepted by Hamilton C.J. in *Georgoboulous v. Beaumont Hospital Board* (at p. 154) to the effect that;

> *"… a breach of fair procedures occurs when a decision maker acts on the basis of information which had been obtained outside of the hearing and which is not disclosed to the party adversely affected."*

126. This Court also unreservedly accepts that principle. However, in the instant case the Tribunal has now disclosed to the applicant all of the advice and material which it has received from Mr Bacon. Documents recording virtually every contact made between Mr. Bacon and the Tribunal have now been furnished to the parties interested in the Tribunal. The Tribunal is still conducting its inquiry. No findings have been made. The applicant may still challenge evidence in whatever manner he deems appropriate. He can do so with the benefit of full disclosure.

127. In those circumstances can it be validly contended that the applicant's right to fair procedures have been infringed? I do not believe so. It follows that I am satisfied that the applicant's right to fair procedures and constitutional justice has not been infringed by the failure of the Tribunal to disclose Mr Bacon's report of 31st March, 2003, to the applicant until September, 2005.

**1. (c) Peter Bacon "Nemo iudex in sua causa"**

128. It is argued on behalf of the applicant that Mr. Bacon has been influenced by the instructions which he has received from and the advice which he has given to the Tribunal and *vice versa*. Accordingly it is contended that the evidence to be adduced before the Tribunal by Mr. Bacon will offend the principle *nemo iudex in sua causa*.

129. The functions of a tribunal of inquiry such as the Tribunal in this case were considered by the Supreme Court in Haughey v. Moriarty [1999] 3 I.R. 1.

130. They were summarised at p. 74 in the following terms.

> *"A tribunal of inquiry of this nature involves the following stages:-*

*1. a preliminary investigation of the evidence available;*

*2. the determination by the tribunal of what it considers to be evidence relevant to the matters into which it is obliged to inquire;*

*3. the service of such evidence on persons likely to be affected thereby;*

*4. the public hearing of witnesses in regard to such evidence, and the cross-examination of such witnesses by or on behalf of persons affected thereby;*

*5. the preparation of a report and the making of recommendations based on the facts established at such public hearing."*

131. The Tribunal first conducted a preliminary investigation in private into what has been described as a potential "money trail." Arising out of that investigation it embarked upon an investigation (again in private), of the technical aspects of the evaluation process leading to the award of the "second GSM phone licence".

132. Witnesses who had or might have had evidence relevant to the inquiry were interviewed by the Tribunal during the private preliminary investigations. Those witnesses could choose to assist the Tribunal if they so wished. If they failed or refused to do so the Tribunal had a range of powers available in order to achieve its objectives.

133. The evaluation process which resulted in the award of the "*second GSM phone licence*" was both complex and technical in nature.

134. It was unsurprising that the Tribunal wished to have a complete understanding of the technical aspects of the process. Mr. Bacon was retained by the Tribunal to provide such an understanding to the Tribunal. As such the advice was relevant to the Tribunal's investigation. Some of the advice provided by Mr. Bacon to the Tribunal was critical of and called into question the evaluation process and the methodology adopted by the PTGSM.

135. The Tribunal's legal advisers first met with Mr. Bacon on 28th November, 2002. They met with Mr. Bacon again on a number of occasions in 2002 and in 2003. The Tribunal received a draft 58 page report from Mr. Bacon on 18th March, 2003. The accompanying email requested a meeting in order to "*finalise the report*"

136. The applicant contended that terms of the email suggested collaboration between the Tribunal and Mr Bacon in the preparation of the report. That was not borne out by the evidence adduced in these proceedings.

137. The final version of that report was submitted to the Tribunal on the 31st March, 2003. It was in the precise terms of the draft report.

138. Thereafter there was no contact between the Tribunal and Mr. Bacon until the latter attended a private meeting with the Tribunal on 3rd June, 2004.

139. On 30th August, 2004, the Tribunal wrote to Mr. Bacon seeking a report from him comprising what was in effect, a summary of his proposed direct evidence to be adduced at a public sitting of the Tribunal.

140. A 28 page report was furnished directly to the Tribunal on 18th January, 2005. It was sent to the applicant's solicitors on 16th March, 2005.

141. The Tribunal has now indicated that it intends to call Mr. Bacon to give relevant evidence (in the terms summarised in the report), at public sittings of the Tribunal.

142. As has already been indicated the inquiry upon which the respondent has embarked is inquisitorial in nature and not accusatorial. The Tribunal was lawfully empowered to conduct a preliminary investigation of available evidence. The Tribunal, as a fact finding body, is lawfully authorised to interview witnesses for its purposes and, subsequently to rely upon the evidence of such witnesses adduced at a public hearing of the Tribunal. That is the inquisitorial nature of the Tribunal's work. It has been explained earlier why its procedures must, necessarily, be different to those employed by the courts in civil and criminal proceedings.

143. There is no reason why this Court should conclude that the expert advice received from Mr. Bacon in private will affect the independence and impartiality which the respondent will bring to the findings and decisions which he must take arising out of the evidence adduced at public hearings of the Tribunal.

144. The respondent will be confined to the evidence adduced at public sittings of the Tribunal to support his findings and decisions. If Mr. Bacon testifies his evidence is likely to be vigorously tested.

145. The fact that the advice given to the Tribunal by Mr. Bacon was critical of the evaluation process and of the methodology adopted is a factor to be taken into account by the respondent in his assessment of the large volume of evidence which has been and will be adduced in this part of the inquiry. That evidence will include such evidence as may be adduced on behalf of the applicant in cross-examination and by way of direct evidence.

146. The respondent enjoys a presumption that he will conduct the inquiry lawfully. That presumption subsists unless and until it is displaced by evidence. There is no such evidence in this case. Rather the contrary is the case. The respondent has, in his rulings, made it clear that he intends to apply appropriate standards to the decisions which he will be required to make.

147. It is contended on behalf of the applicant that the advice provided by Mr. Bacon to the Tribunal created a relationship between the Tribunal and Mr. Bacon sufficiently proximate to give rise to objective bias, that is to say the perception of bias. However the inquisitorial nature of the Tribunal's inquiry gives rise to greater proximity between witnesses and decision maker than would occur in court proceedings. The reasons for that have been explained earlier.

148. Furthermore, as I have already indicated, the advice given by Mr. Bacon to the Tribunal could have been made available to the Tribunal by the appointment of Mr. Bacon as an assessor pursuant to the terms of the Act of 1979. It is acknowledged on behalf of

the applicant that advice provided by Mr. Bacon by that means would have been lawful and appropriate.

149. The respondent has provided with the applicant means of challenging the advice proved by Mr. Bacon. By so doing he cannot reasonably be deemed to have created a perception of bias.

150. It follows that I am satisfied that calling Mr. Bacon to testify at a public hearing of the Tribunal will not cause a respondent to offend the doctrine *nemo iudex in sua causa*.

**2. Michael Andersen – "Irrationality**"

151. It is contended on behalf of the applicant that, by deciding to take no further step to seek the evidence of Michael Andersen through the Danish Court system the respondent has acted irrationally and therefore unlawfully.

152. It is well settled that decisions made by administrative or other Tribunals or decision making bodies which are unreasonable or "*irrational*" are unlawful and may be quashed by the courts. The decision impugned by the applicant in these proceedings is the decision made by the respondent in March, 2005 not to seek the evidence of Michael Andersen through the Danish Courts system.

153. The applicant has not sought an order quashing the decision on grounds of irrationality. He has however sought an order requiring the respondent to seek that evidence and a declaration that his failure to do so is unreasonable and irrational in the circumstances.

154. The test of unreasonableness or "*irrationality*" was discussed by the Supreme Court (Henchy J.) in the *State (Keegan) v. The Stardust Victims Compensation Tribunal* [1986] I.R. 642 at p. 657 – 658 in the following terms:

> *"I would myself consider that the test of unreasonableness or irrationality in Judicial Review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense. If it does, then the decision-maker should be held to have acted ultra vires, for the necessarily implied constitutional limitation of jurisdiction in all decision-making which affects rights or duties requires, inter alia, that the decision-maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision."*

155. In *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, 71 - 72 the Supreme Court (Finlay C.J.) explained that the courts will not intervene to quash a decision for unreasonableness or irrationality unless the applicant can establish *"… to the satisfaction of the court that the decision making authority had before it no relevant material which would support its decision."*

156. When the respondent, in April, 2005, had decided that there was no realistic prospect of the Tribunal securing evidence of any value from Mr. Andersen through the Danish Courts system he had before him a very large volume of material.

157. His decision was made against the background of strenuous efforts made by the Tribunal, by a wide variety of measures over a long period of time to secure Mr. Andersen's attendance at public sittings of a tribunal.

158. When he made his decision he had before him

> (a) records of meetings between the Tribunal and Mr. Andersen and his advisers,
>
> (b) a substantial volume of correspondence of a similar character and
>
> (c) the comprehensive advices of Mr. Oluf to the Government and to the Tribunal as to the prospects of securing evidence from Mr. Andersen through the Danish Courts system.

159. That material was precisely relevant to the decision that the respondent was required to make. It was a decision which the respondent clearly made with reluctance and regret. However he seems to have felt that it was the only sensible decision open to him in the circumstances.

160. It would be absurd to suggest that the decision made in those circumstances was a decision which *"… plainly and unambiguously flies in the face of fundamental reason and common sense."*

161. I am quite satisfied that it was a decision which was entirely within the jurisdiction of the respondent. It cannot be characterised as irrational or unreasonable in the sense identified earlier herein.

162. It was pointed out by Mr. McGonigal S.C that when the respondent decided on 19th July, 2004, to seek the evidence of Michael Andersen through the Danish Court system he had before him the advices of Mr. Oluf Engell. He argued that no new evidence had been placed before the respondent which entitled him to come to another decision in April, 2005. He relied upon a number of authorities in support of his argument.

163. I cannot accept his contention. Mr. Engell attended a consultation with the respondent and the Tribunal advisers on the 4th March, 2005.

164. The advice given by Mr. Engell at that consultation was summarised in a letter from the Tribunal to Mr. Engell dated 7th April, 2005. Mr. Engell confirmed the accuracy of the summary the contents of which have been set out earlier herein.

165. It was based upon Mr. Engell's advice in March, 2005 and a full consideration of all the material before him that the respondent decided that there was no real prospect of obtaining useful evidence from Mr. Andersen through the Danish Courts system.

**1.(b) Michael Andersen – "Proportionality"**

166. It was contended on behalf of the applicant that the evidence of Michael Andersen is of such importance to the vindication of the applicants constitutionally protected right to his reputation and good name that the decision not to seek that evidence through the Danish Court system comprises a disproportionate exercise by the respondent of his jurisdiction.

167. Reliance is placed by the applicant upon the decision of the High Court (Barron J.) in *Hand v. Dublin Corporation* [1989] I.R. 26 and the High Court (Costello J.), *Heaney v. Ireland* [1994] 3 I.R. 593.

168. I am not sure that the principle of proportionality should be considered by this Court in determining the legality of the decision made by the respondent not to seek the evidence of Michael Andersen through the Danish Courts system. The application of that principle would require this court to substitute itself for the respondent and to reconsider the material which was before the respondent in the context of the applicant's constitutional rights.

169. In *Bailey v. Flood* (Unreported 6th March, [2000] the High Court) Morris P. considered the constitutional rights of persons affected by Tribunals of Inquiry.

170. He observed (at p. 484)

> *"The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied ….that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above."*

171. He continued:

> *"However it must at all times be borne in mind that the jurisdiction of this court is limited to the review of a decision. The fact that the constitutional rights of a person affected by the decision are implicated is not a licence for the Court to stand in the shoes of the decision-maker and to speculate as to whether or not it would have come to the same conclusion. The function of the High Court in an application for judicial review is limited to determining whether or not the impugned decision was legal, not whether or not it was correct. The freedom to exercise a discretion necessarily entails the freedom to get it wrong; this does not make the decision unlawful."*

172. In that case it was argued on behalf of the applicant that the damage to his reputation caused by allegations made in public was disproportionate to the requirement to hear evidence which included the allegations.

173. Under the heading "proportionality" Morris P, (at p. 487), considered three possibilities, (its exclusion as evidence, its admission in private and its public admission).

174. He rejected the notion that the court should replace the Sole Member for the purpose of making a determination. He decided that the appropriate test was reasonableness.

175. He declared:

> *"I am satisfied that it would not be appropriate for this Court to interfere with the decision of the Sole member to admit the evidence of the applicant. It is plainly not unreasonable for him to do so, although this doe not determine whether or note the evidence should be heard in public."*

176. In *Radio Limerick One Limited v. Independent Radio and Television Commission* [1997] 2 I.R. 291 the Supreme Court (Keane J.) considered the test of proportionality noting its application at p. 313 *"in determining whether particular legislative provisions are unconstitutional".*

177. He later observed:

> *"No Irish authority was cited for the proposition that the principle of proportionality could legitimately be invoked to test the validity of an administrative act, as opposed to the constitutionality of legislation, primary or delegated. In Hand v. Dublin Corporation [1989] I.R. 26, Barron J., referred to the possibility of such a principle being adopted in this jurisdiction in relation to the exercise of administrative powers, but, in the context of that case, did not have to decide whether it should be so adopted."*

178. Having reviewed a number of English authorities on the test he continued:

> *"…it can be said with confidence that, in some cases at least, the disproportion between the gravity or otherwise of a breach of a condition attached to a statutory privilege and the permanent withdrawal of the privilege could be so gross as to render the revocation unreasonable within the …(Wednesbury….State (Keegan) v. Stardust….) formulation. Thus, in the present case, if the amount of advertising in the applicant's programmes had on two widely separated occasions exceeded the permitted statutory limit by a few seconds the permanent revocation of the licence with all that was entailed for the applicant's livelihood would clearly be a reaction so disproportionate as to justify the court in setting it aside on the ground of manifest unreasonableness. It is unnecessary to emphasise how remote that example is from what admittedly occurred in the present case."*

179. No evidence has been adduced in these proceedings which would warrant the application of a proportionality test by this court to the decision of the respondent, which is sought to be impugned.

**2. Michael Andersen – "Fair Procedures**"

180 It is contended on behalf of the applicant that the decision made by the respondent not to seek the evidence of Michael Andersen through the Danish Courts is a decision which deprives the applicant of his constitutionally protected right to fair procedures and to constitutional and natural justice.

181. Mr. McGonigal S.C. submits that the Tribunal intends to ask Mr. Bacon to comment upon the evaluation process and upon the advice given by Michael Andersen to the PTGSM in respect of that process. He submits that the Tribunal intends to replace the evidence of Mr. Andersen with the evidence of Mr. Bacon.

182. The applicant is seeking injunctive and declaratory relief which will have the effect of precluding the Tribunals from completing its investigation into the award of the second GSM phone licence until it has first secured and heard the evidence of Michael Andersen.

183. It is submitted that this relief is necessary in order to protect and vindicate the applicant's right to his reputation and good

name.

184. In *Goodman International v. Hamilton* (No. 2) [1993] 3 I.R. 307 the High Court (Geoghegan J.) was asked to grant similar relief to an applicant against whom serious allegations of impropriety had been published. The applicant sought declaratory relief intended to prevent the completion of a tribunal of inquiry in the absence of evidence and material to be obtained from the persons who had made and published the allegations.

185. In refusing the relief Geogehgan J. observed "*inter alia*":-

> *"I do of course accept that the Tribunal itself might be obliged to ensure that certain witnesses be available, particularly at the request of a person seeking to vindicate his good name, if such attendance is compellable. But there may be many instances where a relevant witness cannot be made available. It may be that he or she has died, or is too ill to attend and give evidence, or can plead privilege, or simply refuses to give evidence and is out of the jurisdiction. Any obligation which the Tribunal may have to produce a witness which a particular person whose good name is under attack may think is necessary ceases if the procuring of such witness is impossible. In short, therefore, my view is that the Tribunal is carrying out its obligation to vindicate the applicants' good name if it does not permit hearsay evidence to impugn that good name and if it accedes to reasonable requests for the availability of particular witnesses considered necessary for the vindication of a good name provided that it is possible to obtain such witnesses or evidence. I do not think that these views in any way conflict with the judgment of Ó Dálaigh C.J. in In re: Haughey [1971] I.R. 217."*

186. I would respectfully adopt that passage as an accurate statement of the obligation imposed upon tribunals of inquiry of this kind.

187. It is consistent also with a right vested in witnesses before such tribunals and identified, (at para. 58), in the report of the Royal Commission on Tribunals of Inquiry in England, 1966 which provides *inter alia* that:

> *"If a witness wishes further evidence to be called, then a statement of the further evidence will be taken by the Treasury Solicitor. If the Tribunal in its discretion, after seeing this statement considers that the evidence it contains may be material and that it is reasonably practicable to obtain, that evidence should be called by counsel for the Tribunal. This matter must be left to the discretion of the Tribunal in each case…"*

188. In *Mahon v. New Zealand* [1984] 3 ALL E.R. 201 the Privy Council England (Diplock L.J.) distinguished the functions of a tribunal of inquiry from proceedings in the courts and continued:

> *"…in an investigative inquiry… into a disaster or accident of which the commissioner who conducts it is required, as the judge was in the instant case, to inquire into and to report upon "the cause or causes of the crash," it is inevitable, particularly if there are neither survivors nor eye-witnesses of the crash, that the emergence of facts, and the realisation of what part, if any, they played in causing the disaster and of their relative importance, should be more elusive and less orderly, as one unanticipated piece of evidence suggests to the commissioner, or to particular parties represented at the inquiry, some new line of investigation that it may be worth while to explore; whether, in the result, the exploration when pursued leads only to a dead end or, as occurred in one particular instance in the present case, it leads to the discovery of other facts which throw a fresh light on what actually happened and why it happened."*

189. The Tribunal in this case is engaged upon such an inquiry. Some aspects of its investigation will have been more satisfactory than others. Its findings and conclusions will be made after consideration by the respondent of evidence which is adduced at public hearings. It may be unable to make findings on specific issues.

190 No evidence has been adduced in these proceedings which displaces the presumption enjoyed by the respondent that he will conduct the inquiry in a balanced, fair and lawful fashion.

191. I am, accordingly, satisfied that the applicant's right to fair procedures and constitutional justice has not been affected adversely by the decision of the respondent not to seek the evidence of Michael Andersen to the Danish Courts.

**3. "A.M.I. Documents and witnesses"**

192. The principles of irrationality, proportionately and fair procedures which have earlier been identified by this Court in respect of the Tribunal's obligations to secure the evidence of Michael Andersen apply in respect of the other witnesses employed by Michael Andersen at times material to the Tribunal's work.

193. During the course of these proceedings Mr. Murray indicated that the Tribunal is now prepared to seek to adduce the evidence of John Bruel, Michael Thrane, Ole Feddersen, Marieus Jacobson, Tage Iversen and Mikel Vinter provided it is reasonably practicable for the Tribunal to do so and if those witnesses can provide the Tribunal with evidence which is relevant to its inquiry.

194. He points out that no requests were made on behalf of the applicant to the Tribunal for such evidence to be obtained until shortly before the commencement of these proceedings.

195. Mr. McGonigal S.C., in reply, points out that the applicant was unaware until very recently that Michael Andersen was no longer available to provide evidence at public hearings of the Tribunal. Accordingly the applicant was unaware of the need to request additional evidence from the other witnesses.

196. The Tribunal has also indicated during these proceedings it will now seek the documentary evidence from Denmark which the applicant has required and which may be relevant to the work of the Tribunal.

197. As a matter of general principle it is within the discretion of the Tribunal to decide what evidence is relevant and material to the inquiry which it is conducting. It is, therefore, within the discretion of the Tribunal to decide what evidence will be adduced at public hearings.

198. The court will not intervene in such decisions in the absence of evidence of illegality. There has been no such evidence in these proceedings relative to the documentary evidence which the Tribunal now intends to seek and in relation to various witnesses which the Tribunal now intends to contact.

199. I am accordingly satisfied that the applicant is not entitled to the declaratory relief which he seeks in respect of that aspect of

his claim.

**4. Mr. Tony Boyle**
200. It is claimed on behalf of the applicant that by permitting a period of 18 months to elapse between the direct testimony adduced by Mr. Boyle and his cross-examination in respect of that testimony, the respondent has deprived the applicant of fair procedures and has acted in breach of the principles of natural and constitutional justice. Mr. Boyle has now been cross-examined.

201. Several factors, including proceedings commenced by the applicant for relief by way of judicial review against the Tribunal delayed the work of the Tribunal by some 18 months.

202. There is no reason to believe that Mr. Boyle or the applicant have been in any way adversely affected by that delay.

203. The applicant was entitled to cross-examine Mr. Boyle. He has now, apparently, done so. He is entitled to adduce such evidence as he wishes to deal with any aspect of Mr. Boyle's testimony which requires clarification or challenge.

204. The applicant relies upon the decision of the Supreme Court (Keane C.J.) in *McGuire v. Ardagh* [2000] 1 I.R. 385.

205. I am satisfied that the facts of the instant case can be readily distinguished from the facts of that case. I do not intend to recite those facts. They are well known to the parties. They are entirely different to the facts of the instant case.

206. In this case the procedures adopted by the Tribunal provided for cross-examination of witnesses within a reasonable time after examination-in-chief. By reason of exceptional circumstances the cross-examination of one witness was delayed.

207. On the admitted circumstances the delay was reasonable and warranted the postponement which occurred. The applicant cannot point to any specific prejudice.

208. I am satisfied that his rights have not been affected and that he is not entitled to the relief which he seeks.