

**THE HIGH COURT  
JUDICIAL REVIEW**

**[2014 No. 48 J.R.]**

**BETWEEN**

**MICHAEL LOWRY**

**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 Mr. Justice McDermott delivered on the 20th day of January, 2015**

1. The applicant was granted leave to apply for judicial review on 27th January, 2014 (Peart J.), to seek orders of *certiorari* and various declarations as set out in an amended statement of grounds. The applicant seeks orders of *certiorari* quashing the respondent's order of 31st October, 2013, directing that the applicant should recover from the Minister for Finance one third of his costs of appearing before the Tribunal by solicitor and counsel and, if necessary, a similar order quashing the ruling of the respondent in respect of the applicant's application for legal costs. The applicant also seeks declarations that:-

- (a) The respondent acted *ultra vires* and/or unreasonably and disproportionately in withholding two thirds of the applicant's costs...having regard to the applicant's full cooperation in respect of the GSM module of the Tribunal of Inquiry and his "undisputed cooperation" in respect of substantial aspects of the "money trail" module of the Tribunal of Inquiry;
- (b) The order was discriminatory in its terms having regard to previous costs orders made by the respondent, including but not limited to those made in respect of Mr. Charles Haughey and Mr. Ben Dunne;
- (c) There were insufficient reasons to render it equitable to deny the applicant the entirety of his costs or in the alternative, to award him one third of his costs of representation before the Tribunal;
- (d) The respondent acted *ultra vires* and/or erred in law in making findings in respect of the applicant's alleged failure to cooperate or provide assistance to the Tribunal, and/or the giving of false or misleading information to the Tribunal without affording the applicant a right to a fair hearing;
- (e) The applicant enjoyed a legitimate expectation that he would be awarded his costs of the distinct investigations, phases or modules of the Tribunal in respect of which no non-cooperation findings were made, and;
- (f) The manner of the application and construction by the respondent of s. 6(1) (a) of the Tribunals of Inquiry (Evidence) (Amendment) Act 1979, (as amended), is contrary to the provisions of Bunreacht na hÉireann and, in particular, Articles 34 and 40 thereof.

A number of other declarations were sought which are not relevant to the application now before the court, in which the applicant seeks discovery pursuant to O. 31, r. 12 of the Rules of the Superior Courts of the following documents:-

"Category 1:

- (a) All costs orders of the Tribunal in relation to parties represented before it, including those orders where parties were granted other than their full costs;
- (b) Any communications of the Tribunal to person/s represented before it notifying them of matters which may be material to the Tribunal's consideration of such person/s' application/s for costs, being matters which constitute or evidence a failure to cooperate with or provide assistance to the Tribunal or knowingly give false or misleading information to the Tribunal;

Category 2:

All documents and correspondence between witnesses (or their representatives) and the Tribunal relating to the provision of further evidence by those witnesses subsequent to the circulation of the provisional findings; and

Category 3:

All orders or documents relating to any arrangements whereby the Tribunal made interim arrangements with appropriate government departments to defray or discharge the costs of parties represented before it."

2. The relevant grounds advanced by the applicant in respect of the reliefs sought which are relevant to this notice of motion include grounds 73 – 77 in respect of the alleged discrimination by the respondent in dealing with the applications for costs made in respect of the late Mr. Charles Haughey and Mr. Ben Dunne in respect of Category 1. Furthermore, the applicant relies upon the grounds 84 – 86 inclusive relating to the alleged denial of a right to a fair hearing in making findings concerning non-cooperation, failure to provide assistance or the giving of false or misleading information to the Tribunal against the applicant.

3. The applicant submitted two affidavits sworn 24th January, 2014 and 28th July, 2014, the latter in response to that of Mr. Stuart Brady, Solicitor on behalf of the respondent, sworn 26th May, 2014. A further affidavit was sworn by Mr. Brady on 7th October, 2014, and a third affidavit by Mr. Lowry on 20th October.

4. A statement of opposition dated 27th May, 2014, was delivered. A notice to produce was issued on 22nd October which was the subject of a judgment by the High Court [2014] IEHC 602.

5. A notice of motion issued on 23rd October, 2014, and is grounded on the affidavit of Mr. Raymond Noone, Solicitor, which it is accepted by counsel for the applicant encapsulates the grounds upon which discovery is sought.

### **The Challenged Ruling and Order**

6. In September, 1997 the respondent was appointed as a sole member of the Tribunal pursuant to Resolutions of Dáil Éireann and Seanad Éireann passed on 11th and 18th September, 1997, respectively. The terms of reference of the Tribunal required it "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...definite matters of urgent public importance" which related to, *inter alia*, payments made directly or indirectly to the applicant 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". The Terms of Reference relevant to the applicant are set out in the amended statement of grounds. The order establishing the Tribunal also provided that the tribunal member should complete the inquiry in as economical a manner as possible and at the earliest stage consistent with the fair examination of the matters referred to the Tribunal. In addition:-

"All costs incurred by reason of the failure of individuals to cooperate fully and expeditiously with in the inquiry should so far as is consistent with the interests of justice, be borne by those individuals."

7. Section 6(1) of the Tribunal of Inquiry (Evidence) (Amendment) Act 1979, as amended by the Tribunals of Inquiry (Evidence) (Amendment) Act 1997, provides for the making of costs orders by the Tribunal as follows:-

"(1) Where a tribunal...is of opinion that, having regard to the findings of the tribunal and all other relevant matters (including the terms of the resolution passed by each House of the Oireachtas relating to the establishment of the tribunal or failing to co-operate with or provide assistance to, or knowingly giving false or misleading information to, the tribunal), there are sufficient reasons rendering it equitable to do so, the tribunal, or the chairperson, as the case may be, may, either of the tribunal's or the chairperson's own motion, as the case may be, or on application by any person appearing before the tribunal, order that the whole or part of the costs—

(a) of any person appearing before the tribunal by counsel or solicitor, as taxed by a Taxing Master of the High Court, shall be paid to the person by any other person named in the order;

(b) incurred by the tribunal, as taxed as aforesaid, shall be paid to the Minister for Finance by any other person named in the order."

8. The applicant was granted full representation before the Tribunal on 31st October, 1997. The applicant engaged with and appeared before the Tribunal on numerous occasions over a very considerable period from 1997 to 2013, and was advised and represented by solicitors, counsel and accountants over some 384 days of public hearings. In addition, the applicant claims that there were numerous private sittings and meetings, communications and correspondence with the applicant's legal representatives and financial advisers outside those sittings days, and the applicant submits that he was obliged pursuant to s. 3 of the Tribunal of Inquiry Act 1921, (as amended) to appear before, give evidence to and comply with the provisions of orders made by the Tribunal. The applicant maintains that at all material times he cooperated with the Tribunal whether by attending as a witness, attending numerous private meetings with the Tribunal's legal team, preparing memoranda of intended evidence on issues the subject of the Tribunal's inquiries, furnishing submissions upon relevant issues to the Tribunal, providing waivers authorising the Tribunal to examine the applicant's bank statements and financial affairs, dealing with extensive correspondence from the Tribunal and reviewing and responding to voluminous material and booklets furnished by the Tribunal, at great personal expense. The Tribunal made no provision for the making of or adjudication upon applications for costs on an interim basis over the period of his engagement with the Tribunal.

9. The Tribunal delivered the first part of its report in or about December, 2006 and the second part in or about March, 2011. The first part of the report concerned payments made to the late Mr. Haughey. The second part of the report made findings against the applicant of a substantive nature. It is claimed that it also made findings of non-cooperation in respect of the applicant's conduct during the course of the 17 year duration of the Tribunal in respect of one aspect of its inquiries known as the "money trail" issue. It is submitted that the second report did not make any findings of non-cooperation or falsification in respect of the "GSM" issue, which the applicant contends constituted some 70% of the work of the Tribunal in respect of the applicant's affairs.

10. On 29th June, 2011, the respondent invited written submissions from the applicant in respect of the costs issue to be delivered within a period of four weeks. Detailed submissions supporting an application for costs were made by 27th July. By letter dated 1st March, 2012, the Tribunal notified the applicant of certain matters which were considered to be material to the respondent's consideration of the application for costs. The applicant was furnished with a schedule of matters to which the Tribunal intended to have regard in respect of whether he had failed to cooperate with or provide assistance to, or knowingly given false or misleading information to the Tribunal at any stage of its inquiries. The purpose of the letter was to give notification of these matters to the applicant which could constitute or evidence a failure on the part of Mr. Lowry to cooperate with or provide assistance to the Tribunal, or his knowingly giving false or misleading information to the Tribunal within the meaning of s. 6 of the Act. These matters were as follows:-

(i) Mr. Michael Lowry knowingly concealed from the Tribunal throughout the period of his initial engagement with the Tribunal up to and including his evidence in 1999 the details relating to the Irish Nationwide (IOM) Account operated in his name on 21 October, 1996, and the details surrounding the provision of IR£147,000.00 to him by Mr. David Austen which was lodged to that account.

(ii) Mr. Lowry thereafter failed to notify those matters to the Tribunal until his belated disclosure in 2001, at a time when it was very likely that the Tribunal would independently and imminently discover those matters.

(iii) Mr. Lowry was centrally involved in the falsification and suppression of documentation with the intention of misleading and frustrating the work of the Tribunal, and his conduct in this regard mislead and frustrated the Tribunal in fact.

(iv) Mr. Lowry together with others set about and implemented a course of furnishing to the Tribunal a materially false documentary record of the Mansfield and Cheadle property transaction.

(v) Mr. Lowry was involved in, and had knowledge of the creation of, the falsified versions of Mr. Christopher Vaughan's files concerning the Mansfield and Cheadle property transactions, with the intent and for the purpose of producing those falsified versions of the files to the Tribunal, and of concealing references to Mr. Lowry in connection with those transactions. In consequence of that involvement, a false and deliberately misleading account of Mr. Lowry's connection to the Mansfield and Cheadle property transactions was provided to the Tribunal, first in the course of the Tribunal's private inquiries and, later, in the course of evidence given at public hearings.

(vi) Mr. Lowry's sworn evidence to the Tribunal in relation to his connection to the Mansfield and Cheadle property transactions, and in relation to Mr. Christopher Vaughan's files concerning those transactions, was knowingly false and misleading, and consistent only with the falsified version of Mr. Vaughan's files, and Mr. Lowry's knowledge of and participation in the falsification of those files.

(vii) The purpose of the falsification and suppression of these documents was to mislead the Tribunal as to the true nature and extent of Mr. Lowry's involvement in the transactions under inquiry, and thereby to undermine its investigation.

(viii) The effect, in fact, of Mr. Lowry's conduct and evidence in relation to the Mansfield and Cheadle property transactions was to mislead the Tribunal and to frustrate and protract significantly the work of the Tribunal over a period of years.

(ix) Mr. Lowry, at a time when he had purported to provide full cooperation to the Tribunal, knowingly concealed from the Tribunal dealings between Mr. Dennis O'Connor, his accountant acting on his behalf, and Mr. Kevin Phelan and Mr. Aidan Phelan concerning the settlement of disputes relating to property transactions then being examined by the Tribunal.

(x) Mr. Lowry together with Mr. Dennis O'Connor orchestrated the negotiation and conclusion of agreements with Christopher Vaughan and Mr. Kevin Phelan in April, 2002, whereby Mr. Phelan was paid a total of STG£65,000.00 in relation to the Vine Acre Property Project, in which Mr. Lowry had an interest. The predominant purpose of these agreements was to ensure Mr. Phelan's participation in choreographed exchange of untruthful correspondence, for submission to the Tribunal, for the sole purpose of misleading and concealing from the Tribunal the true facts concerning the long form/short form correspondence of Mr. Vaughan, then being inquired into by the Tribunal.

(xi) Mr. O'Connor as agent of Mr. Lowry, negotiated and arranged a further payment of STG£150,000.00 by Mr. Dennis O'Brien/West Ferry Limited, which, in combination with the STG£65,000.00 already paid in respect of the Vine Acre Project, comprised a global settlement with Mr. Kevin Phelan, the predominant purpose and intention of which was to ensure that Mr. Kevin Phelan would not undermine the false version of Mr. Lowry's involvement in the UK properties already tendered to the Tribunal. This latter settlement was executed in the knowledge that Mr. Kevin Phelan had in his possession information and material which contradicted the false version of the property transactions, and was executed for the purpose of ensuring that Mr. Kevin Phelan would not, as he had threatened to do, draw the existence of that information and material to the attention of the Tribunal.

(xii) Mr. Lowry knowingly concealed from the Tribunal the nature and extent of Mr. Dennis O'Connor's involvement in settling disputes with Mr. Kevin Phelan, relating to the Doncaster Rovers, Cheadle and Mansfield Property transactions, as well as the material and documentation that came to light in the course of those disputes and settlements.

(xiii) Mr. Lowry knowingly concealed Mr. O'Connor's extensive role on Mr. Lowry's behalf in negotiating and executing agreements and settlements, and in acting as an intermediary in relation thereto, and he further concealed from the Tribunal the matters to which Mr. O'Connor's role related, with the intention of misleading the Tribunal and of frustrating its inquiry.

(xiv) The sole intention of the false stratagems and deliberate untruths aforesaid, in which Mr. Lowry was fully implicated, was to frustrate and impede the work of the Tribunal.

(xv) The effect, in fact, of Mr. Lowry's conduct and evidence in relation to the Doncaster Rovers, Cheadle and Mansfield property transactions was to mislead the Tribunal and to frustrate and protract significantly the work of the Tribunal over a period of years."

11. The applicant was given an opportunity to make submissions concerning these matters in writing to be received by the Tribunal by 30th March, 2012. A correspondence ensued between the applicant and the respondent in which further particulars were sought by letter of 28th March, 2012. In a reply on 4th April, the respondent stated that the schedule of matters set out above was not in the nature of a pleading in respect of which it was appropriate to provide particulars and that the matters were clear in their terms and provided sufficient information to formulate a submission.

12. The respondent for its part contends that all submissions made by and on behalf of the applicant in relation to these matters were considered in the costs ruling.

13. By an order dated 31st October, 2013, the respondent directed that the applicant should recover one third of the legal costs as were reasonably incurred and at a reasonable rate in respect of work undertaken within the terms of reference of the Tribunal. The costs were payable by the Minister for Finance on a party and party basis when taxed and ascertained (in default of agreement) by a Taxing Master of the High Court.

14. The Tribunal made the following determination:-

"16. Having regard to all the foregoing matters, the Tribunal is satisfied beyond any doubt that Mr. Lowry, in a number of significant respects, failed to cooperate with the Tribunal in the course of its inquiries and knowingly provided the Tribunal with false information with a view to misleading the Tribunal, which in turn had the effect of delaying the Tribunal's work. Accordingly, the Tribunal is satisfied that Mr. Lowry should not be awarded all of his legal costs. The question arises then whether Mr. Lowry is entitled to any portion of those costs, which, as is set out in the Tribunal's ruling in relation to the general principles to be applied to costs orders, is a question of not insignificant complexity and requires a consideration

of a number of possible factors, including those listed by way of example in that ruling.

17. In considering what portion, if any, of Mr. Lowry's costs should be allowed, amongst the matters to be considered is the fact that all of the findings of non-cooperation relate to various aspects of what has been referred to as the Tribunal's money trail inquiries, and the Tribunal has made no findings of non-cooperation in connection with the Tribunal's inquiries into the awarding of the second mobile GSM license. Those latter inquiries comprised a considerable portion of the Tribunal's work and took up a significant number of days of public hearings, and Mr. Lowry was entitled to be legally represented in respect of those hearings. That said, the bulk of the material, information and evidence that formed the basis of those inquiries was provided by the relevant government departments and the civil servants who had been involved in the licensing process. Mr. Lowry's involvement, both in private and in public, was accordingly less central than was his involvement in the money trail element of the Tribunal's inquiries, and, unlike in the case of the money trail, Mr. Lowry had a more limited involvement in and control over the provision of information and material to the Tribunal. It is also the case that there was a significant degree of overlap and interconnection between those two related aspects of the inquiries. Nonetheless, Mr. Lowry is entitled to an order in respect of a portion of his costs to reflect the absence of findings of non-cooperation in connection with that aspect of the Tribunal's inquiries.

18. The Tribunal must also have regard to the seriousness of the findings it has made in relation to non-cooperation and the extent to which the concealment or falsification went to the very core of its inquiries. It is difficult to imagine a more reprehensible conduct than the calculated and concerted falsification of a solicitor's files prior to their provision to the Tribunal with a view to obscuring the truth. Nor can the Tribunal ignore the real effect of such conduct and non-cooperation on its inquiries and their length. The examination of the IR£147,000.00 deposit in Irish Nationwide (IOM) Limited would have been completed in 1999, rather than two years later in 2001. Had unfalsified files and truthful information concerning the English property transactions been provided in early 2001, the Tribunal might have concluded its inquiries into those matters in a matter of days or weeks, rather than discovering for the first time new material, previously concealed, as late as eight years later, in the course of its hearings in 2009. Nonetheless, in the teeth of overwhelming evidence to the contrary, Mr. Lowry continues to this day, including in the submissions considered in the course of this ruling, to deny any concealment of falsification, and seeks the reimbursement of his full legal costs including those costs incurred by him during periods when his own conduct significantly contributed to the inquiries being unnecessarily prolonged.

19. Taking all relevant matters into consideration, the Tribunal rules that Mr. Lowry should be entitled to recover one third of his costs on the basis set out in the attached order'.

## Discovery

15. This application is made pursuant to O. 31 r. 12 (1) of the Rules of the Superior Courts. Order 31 r. 12 (3) provides that an order shall not be made if the court shall be of opinion that it is not necessary for disposing fairly of the cause or matter or for saving costs. The principles applicable to discovery in civil actions have been established in a number of Supreme Court decisions including *Ryanair Plc v. Aer Rianta* [2003] 4 I.R. 264 and *Framus Limited v. CRH Plc* [2004] 2 I.R. 20. As stated by Fennelly J. in *Ryanair* the "universally accepted test of what is the primary requirement for discovery" is that stated by Brett L.J. in *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Company* [1882] 11QB 55:-

"The documents to produce are not confined to those which would be evidence either to prove or to disprove any matter in question to the action...It seems to me that every document relates to the matter in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may* – not which *must* – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put the words "either directly or indirectly" because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences."

These principles also apply to discovery in judicial review proceedings *O'Keeffe v. An Bord Pleanala* [1993] 1 I.R. 36.

16. The application of these principles in judicial review proceedings was further considered in *Carlow Kilkenny Radio Limited v. Broadcasting Commission* [2003] 5 I.R. 528 and *Kilkenny Communications v. Broadcasting Commission* [2004] 1 ILRM 17, and applied in a number of High Court decisions including *Fitzwilton v. Judge Mahon* [2006] IEHC 48 and *MacAodhain v. Eire* [2004] IEHC 20.

17. From the above authorities, the following principles emerge;

(1) An Order for discovery should only be granted where the applicant seeking discovery establishes that the discovery sought is relevant and necessary for the fair disposal of the issues in a case in the sense indicated by Brett L.J. in the *Peruvian Guano* case:

(2) The court must determine whether the documents sought are relevant to the issues to be tried as determined from the pleadings:

(3) A party may not seek discovery in order to find out whether a document may be relevant and a general trawl through a party's documentation is not permitted. However, a reasonable possibility that the documents are relevant is sufficient (*per* Hardiman J in *O'Callaghan v. Mahon* [2008] 2 I.R. 514):

(4) Judicial review is not concerned with the correctness of a decision but the way in which the decision was reached. Therefore, the categories of documents which a court would consider necessary to be discovered would be much more confined than if the litigation was related to the merits of the case and this necessarily restricts what may be regarded as appropriate discovery.

(5) Discovery will not normally be regarded as necessary if the judicial review application is based on impropriety which may be established without the benefit of discovery:

(6) If a decision is challenged as unreasonable or irrational discovery will not be necessary because if the decision is clearly wrong, it is not necessary to ascertain how it was reached:

(7) Discovery may be necessary where there is a clear factual dispute on the affidavits which must be resolved in order to adjudicate properly or fairly on the application or where there is *prima facie* evidence to the effect that a document that ought to have been considered before a decision was made was not or a document which ought not to have been seen before a decision was considered.

(8) The court must consider whether discovery is necessary having regard to the grounds upon which the application is founded or the state of the evidence (*per* Laffoy J. in *Fitzwilton* cited above). But the question must be decided in respect of the issues that arise on the judicial review application rather than the substantive issue which was before the decision maker (*per* Clarke J. in *MacAodhain* cited above).

(9) An applicant is not entitled to go behind an affidavit by seeking discovery to undermine its correctness unless there is some material outside that contained in the affidavit to suggest that in some material respect the affidavit is inaccurate: it is inappropriate to allow discovery the only purpose of which is to act as a challenge to the accuracy of an affidavit.

### **The Documents Sought**

18. The applicant seeks discovery of three categories of documents.

#### **Category One**

19. The applicant seeks discovery of all costs orders of the Tribunal in which parties were granted other than their full legal costs and/or any communications of the Tribunal to persons represented before it notifying them of matters which may be material to the Tribunal's consideration of their applications, being matters which constitute or evidence a failure to cooperate with or provide assistance to the Tribunal or knowingly give false or misleading information to it. These documents are said to relate to the declaration sought that the challenged costs order was discriminatory in its terms, having regard to previous costs orders made by the respondent including but not limited to those made in respect of the late Mr. Charles Haughey and Mr. Ben Dunne. This discovery is said to be relevant and necessary to the determination of the issues raised by grounds 73 - 77 inclusive.

20. The applicant relies upon part 1 of the report of the Tribunal in particular a section titled "*Brief Concluding Observations*" at paras. 22/04 to 22/06 in which the Tribunal held as follows:-

"No information whatsoever in relation to payments found to be within the terms of reference was at any stage volunteered by or on behalf of Mr. Haughey. Whilst some related aspects were subsequently and belatedly admitted on his behalf, several portions of his related testimony are viewed as unacceptable and are rejected.

In particular the Tribunal cannot accept the testimony given by Mr. Haughey to the effect that he knew virtually nothing of his financial arrangements and left these matters to Mr. Traynor. Apart from Mr. Haughey's own considerable involvements in these arrangements personally, the Tribunal is satisfied from the evidence...that the nature of substantive arrangements was imparted to Mr. Haughey by Mr. Traynor in the course of their frequent dealings. As a relatively limited example in itself, the evidence of Mr. Haughey given on 6th March, 2001, to the effect that he had never heard of the Cayman Islands before the Tribunal started and had never at the time of his meetings with Mr. Traynor known that Mr. Traynor was a regular traveller to the Cayman Islands on foot of his business interest, is unbelievable.

The Tribunal simply rejects and notes with some regret evidence given by Mr. Haughey in which he sought to saddle such individuals as...with responsibility for particular aspects of financial affairs. Regarding funds from the leaders allowance account, which were applied for the benefit of Mr. Haughey, the version advanced in evidence by Mr. Haughey to the effect that Ms. Foy operated a form of accounting procedure to ensure restitution in relation to any personal benefit obtained by Mr. Haughey is specifically rejected."

21. In addition the applicant relies on paras. 22/08 and 22/10 of part one of the report in which reference is made to the fact that the late Mr. Haughey had received aggregated funds from 1979 to 1996 of €9,106,369.17 and if that figure were taken as a multiple of Mr. Haughey's gross salary for the year 1998, it represented a multiple of 171 times his gross salary. On this basis the applicant claimed in ground 75:-

"There is a manifest irrationality and discrimination as between the manner in which Mr. Haughey's costs were treated by the Tribunal - complete recovery of same - and those of Mr. Lowry, in particular where the Tribunal only identified one relevant bank account not specifically brought to their attention by Mr. Lowry (though later denied by him) whereas the Tribunal found that "no information whatsoever in relation to payments found to be within the terms of reference was at any stage volunteered by or on behalf of Mr. Haughey". Reference will be made to the report, part one to identify the very large volume of payments made to Mr. Haughey and not identified to the Tribunal."

22. The applicant further relies upon para. 22/17 of part one of the report in respect of Mr. Ben Dunne which states: -

"It has already been noted that the role of Mr. Ben Dunne was both substantial and crucial. While it is accepted that Mr. Dunne was a courteous witness and one who regularly attended public sittings when requested to do so, the Tribunal cannot accept what has been conveyed to it in submissions and medical reports furnished on his behalf to the effect that the several instances of further payments on his part discovered by the Tribunal had eluded his memory. From careful observation of Mr. Dunne in evidence on several occasions, not least in his recollections of the earlier portion of dealings had in relation to the Dunnes Trust, it appeared he could be an astute and observant witness in respect of many matters and given the high quality of and assistance and advice at all times available to him, the Tribunal cannot accept that all these successive transactions and in particular one so pivotal as the triple plan payment were matters in respect of which he had no actual recollection."

23. On that basis the applicant claims at ground 77 that:-

"In other words, the Tribunal concluded he (Mr. Dunne) was not telling the truth to it about his recollection of very relevant events. Nonetheless, he appears to have received full costs. This is entirely inconsistent treatment having regard to the treatment of the applicant."

24. The respondent in the statement of opposition at para. 10 denies that the challenged order or ruling were discriminatory in their terms as alleged and in a replying affidavit by Mr. Stewart Brady, Solicitor to the Tribunal, it is stated at paras. 53 to 54:-

"There are clear differences between the nature of the findings made in respect to the matter of the two witness (the late Mr. Haughey and Mr. Dunne) and the findings made in relation to Mr. Lowry. While it is correct that the Tribunal did make an observation that Mr. Haughey did not volunteer information in relation to payments, the Tribunal did not find that Mr. Haughey had deliberately misled it. Once a person does volunteer to provide information, as Mr. Lowry did, and thereafter professes to have provided full and comprehensive information, while in fact withholding significant information that falls within the terms of that purported cooperation, that amounts to concealment and non-cooperation. As regards the further matters referred to relating to Mr. Haughey they are situations in which the Tribunal did not accept the evidence provided by Mr. Haughey. The Tribunal has made it clear in its costs rulings that it has not refused a person's costs simply because it has not accepted evidence given or has preferred contrary evidence given by other witnesses. Indeed, there are many instances in the Tribunal's report where the Tribunal did not accept Mr. Lowry's evidence, including instances in connection with GSM inquiries. However the Tribunal did not have regard to such instances when determining non-cooperation for the purposes of making costs orders."

25. In respect of Mr. Dunne, Mr. Brady stated:-

"While the Tribunal did conclude that Mr. Dunne did not bring the payments to the attention of the McCracken Tribunal, it is no part of this Tribunal's function to make findings in relation to the non cooperation or in relation to costs arising from a person's conduct before a different Tribunal. The circumstances in which there was no practical adverse effect by reason of the payments coming to the attention of the Tribunal from another source contrast markedly, with for example, the two year delay between Mr. Lowry initially professing full cooperation with the Tribunal and his belated admission to the existence of £147,000 deposit at a time when that deposit would have been imminently discovered by the Tribunal in any event."

26. In a further affidavit of 28th July, 2014, Mr. Lowry takes issue with this evidence and cites further sections of part one of the Tribunal's report in relation to the adverse findings made against the late Mr. Haughey quoting extensively from the report in that regard at paras. 43 to 51 inclusive thereof. Mr. Lowry also cited further extracts from the Tribunal report part one in respect of the evidence of Mr. Ben Dunne at paras 52 to 54 inclusive.

27. At para. 55 of Mr. Lowry's second affidavit, he refers to the fact that Mr. Christopher Vaughan, a solicitor, succeeded in having his costs discharged by the Tribunal. He claimed:-

"While the applicant continues to refute any knowledge or participation in any falsification of correspondence, there could be no consistency of logic that would conclude that the solicitor (Mr. Vaughan) responsible for these files, the author or recipient of these letters and an attendee in Agent Phelan's Office in March 2001 (from which attendance the Tribunal has sought to infer so much), should be entitled to his costs, but that the applicant be punished where no evidence linking him to any falsification was adduced."

28. These claims were addressed by Mr. Brady's further affidavit sworn on the 7th October, 2014, at paras 26 to 29 inclusive.

29. On 20th January, 2014, Mr. Brady as solicitor to the Tribunal wrote to the applicant's solicitors in respect of a request for details in relation to rulings made to date concerning costs together with copies of any orders made and stated:-

"1. The Tribunal forwarded to your client under cover of letter dated 31st October 2014 a copy of its general ruling on costs, a copy of a ruling in respect of an application for legal costs by Mr. Michael Lowry, and a copy of the sole member's order for costs in favour of your client. The general ruling on costs is the only general ruling that the Tribunal has made to date in respect of costs. As set out in para. 2 of that general ruling, the Tribunal has identified a limited number of applicants in respect of whose costs application specific consideration has been given by the Sole Member as to whether non cooperation with the Tribunal in the course of its inquiries should be a factor relevant to the making of any such orders by the Sole Member. The Tribunal can confirm that, to date, your client is the only such person in respect of whom a Ruling or Order has been made by the Tribunal, following such a consideration by the Sole Member. Any other Rulings and Orders for Costs that have been made by the Tribunal to date have related to persons in respect of whose applications specific consideration as to non-cooperation was not required.

As the Tribunal has indicated in its covering letter to your client's other solicitors of 31st October, 2013, the Tribunal will publish its Costs Rulings on its website when all remaining Costs Rulings and Orders have been made by the Sole Member."

30. It should be noted in respect of Mr. Vaughan that though travel expenses had been discharged in respect of his attendance at the Tribunal, he was informed that, like other parties, he could make an application in respect of any other costs which he may have incurred. Mr. Brady in his affidavit states that Mr. Vaughan availed of that opportunity and that his application was being considered by the respondent.

31. The applicant clearly alleges unequal treatment by the Tribunal in this case when compared to that of Mr. Haughey and Mr. Dunne. The applicant claims a declaration that the ruling and order were discriminatory having regard to the previous costs orders made by the respondent, including but not limited to, those made in respect of the late Mr. Haughey and Mr. Dunne. However, the grounds of relief at paras. 73 to 77 inclusive allege a "manifest irrationality and discrimination" as between the manner in which the late Mr. Haughey's costs were treated and those of Mr. Lowry and in respect of Mr. Dunne, that granting costs to Mr. Dunne in their entirety was "entirely inconsistent treatment having regard to the treatment of the applicant".

32. Both parties rely heavily on parts one and two of the Tribunal's report concerning the conclusions reached by the Tribunal in respect of the testimony of the late Mr. Haughey, Mr. Dunne and the applicant. There is no difficulty in establishing the conclusions reached in respect of the respective witnesses from parts one and two of the report. No allegation of *male fides* is made against the respondent in reaching those conclusions or other conclusions in the challenged ruling and order. The respondent claims that there were clear distinctions to be drawn between the findings made in respect of the late Mr. Haughey and Mr. Dunne and those made in respect of the applicant. Furthermore, it is accepted that the Tribunal did not give specific consideration as to whether non-cooperation with the Tribunal in the course of its inquiries should be a factor relevant to the making of the orders in their cases. The applicant was the only person in respect of whom a ruling and order had been made by the Tribunal following a specific consideration of non-cooperation with the Tribunal. It is clear from the letter of 20th January, that the issue of non-cooperation with the Tribunal was not considered in the cases of the late Mr. Haughey or Mr. Dunne. It indicates that a consideration of non-cooperation with the Tribunal "was not required" in those two cases. Thus, it would appear that the process engaged in with Mr. Lowry pursuant to the general ruling on costs (which is not under challenge in these proceedings) and whereby notice was given to Mr. Lowry of the intention to consider his non-cooperation and requesting that he make submissions in that regard, was unnecessary in their cases.

33. The grounds and evidence advanced to date demonstrate that there are only two costs orders made in respect of persons against whom serious adverse findings were made in respect of credibility and behaviour which might have been considered as non-cooperation under s. 6 of the Act by the Tribunal. No specific consideration appears to have been given to the issue of non-cooperation in the case of the late Mr. Haughey and Mr. Dunne's applications for costs which the applicant contends ought to have occurred if the Tribunal were to treat their applications and his equally in accordance with a rational and consistent application of the test of "non-cooperation" and its consequences. The applicant claims that a failure to consider non-cooperation in their cases demonstrates discrimination against him and/or an irrational and inconsistent application of the test. The rulings and orders in respect of the late Mr. Haughey and Mr. Dunne have yet to be published by the Tribunal, though it is intended to do so at a later date.

34. The court is satisfied that it is relevant and necessary that discovery be made by the respondent of the rulings and orders made in the case of the late Mr. Haughey and Mr. Dunne. Furthermore, the discovery order will extend to any costs ruling or order in respect of any other party represented before the Tribunal who was informed prior to the making of the order or ruling of the Tribunal's intention to give specific consideration to matters which might constitute evidence of failure to cooperate with or provide assistance to the Tribunal, or knowingly give false or misleading information to the Tribunal and which orders or rulings contain a specific consideration of same. The court is not satisfied that it is relevant or necessary for a fair hearing and determination of the issues in this case that the wider relief claimed in respect of category one documents be granted. Without in any way commenting on any aspects of the merits of the applicant's claim, the court is satisfied that the documents, the subject of the proposed discovery order, may directly or indirectly enable the applicant to advance his case or damage that of the respondent.

### Category Two

35. The applicant seeks discovery of all documents and correspondence between the witnesses (or their representatives) and the Tribunal relating to the provision of further evidence by those witnesses subsequent to the circulation of provisional findings by the Tribunal. It is claimed that these documents are necessary to determine the issues concerning the declarations sought that the respondent acted *ultra vires* in making findings of failure to cooperate without affording a fair hearing. The grounds said to support this claim are set out at paras. 84 – 86 inclusive in the amended statement of grounds. Paragraph 84 identifies para. 27 of the general ruling on costs made by the respondent which stated that any decision to disallow a person's costs must comply with the principles of justice and fairness. The respondent set out the 15 matters in respect of which the issue of non-cooperation was under consideration by the Tribunal in respect of the costs issue under section 6. The applicant made written submissions in relation to these matters. The applicant claims that there was a failure of fair procedures in that certain matters in respect of which adverse conclusions were reached against him were not put to him in the course of the Tribunal hearings gave rise to a failure of fair procedures. The applicant claimed that:-

"85. The respondent's standards elaborated for compliance with fair procedures were deficient in that the Tribunal failed to put matters to the applicant during his oral testimony on the basis of which it purported to conclude his evidence was untruthful, or that he had not cooperated or had falsified material."

36. This is expanded upon in para. 86 and particularised in the following way:-

"86. In particular, the Tribunal has failed to give the applicant an opportunity to be heard in respect of evidence adduced by Mr. Vaughan in June, 2009, which evidence was relied upon by the Tribunal in respect of the falsification of Mr. Vaughan's file. Inconsistent with the Tribunal's indications in 2005 that the applicant's evidence would be heard following other relevant witnesses, the applicant was not afforded any further opportunity to give evidence in light of the evidence given subsequent to his testimony to address the controversial evidence (if it be properly so called) upon which the non-cooperation findings (and the prior provisional and final substantive findings) rely. By correspondence dated 18th December 2009, the applicant's solicitors drew attention to the respondent's statement that "The Tribunal has indicated that Mr. Lowry would be the last witness called in relation to the remaining GSM and other matters..." The Tribunal responded by letter dated 23rd December, 2009, that it was not aware of any further information which the applicant had which would be appropriate to lead in further evidence. The applicant's solicitors reiterated their desire to give further evidence by letter dated 6th January, 2010...Whilst a significant focus of this correspondence concerns the GSM process, it is clear that the initially indicated sequence of the Tribunal was broader in application. It is perverse that the Tribunal would arrive at such adverse findings, based on material which was never adduced in oral evidence, without at a minimum seeking to put this hypothesis to the applicant in the course of his testimony. The last date upon which the applicant gave evidence was in 2007, some two years before Mr. Vaughan's evidence in 2009."

37. In the statement of opposition, the respondent traverses these grounds. In Mr. Brady's affidavit of 26th May, 2014, the matters are addressed at paras. 60 – 66 inclusive. He outlined that since 2008, when the Tribunal issued its provisional findings concerning its main report, it made it clear to Mr. Lowry that its procedures involved giving an opportunity to those persons affected by provisional findings, to consider them in advance, and to make written submissions prior to any final findings being made. The applicant was informed that at the conclusion of its public hearings, when all the evidence heard by the Tribunal was analysed and assessed, it would then be possible for the Tribunal to formulate provisional findings. The Tribunal did not have a particular case to make as in civil litigation or criminal proceedings where it would be obliged to put that case or any allegations or propositions underlying the case to a defendant or an accused person. The object of the written submission procedure was to accord Mr. Lowry and other affected persons the opportunity to protect their reputations by considering the provisional findings without putting them into the public domain, and giving each person an opportunity to respond fully to them. Though some of the initial provisional findings had been leaked to certain newspapers in 2008, the Tribunal took immediate steps to seek to block their publication against a number of media organisations. Mr. Brady contends that the Tribunal went to significant lengths to guard the confidentiality of its procedure solely designed to protect the reputations of those affected during the process.

38. At para. 52, Mr. Brady indicates how the Tribunal acceded on a number of occasions to requests to call further evidence in public hearings following the issuing of its provisional findings when an affected person was able to show that additional evidence, which would be of assistance to that person in responding to the provisional findings was available. The Tribunal heard evidence from Mr. Vaughan, amongst others, and recalled a number of other witnesses. Mr. Brady states that the correspondence exhibited by Mr. Lowry indicates that the Tribunal would have allowed him to give any evidence he wished if he were able to demonstrate to the Tribunal that he had further information which it was appropriate to obtain by way of such evidence. An exchange of correspondence ensued in which Mr. Lowry's solicitors contended that the failure to permit Mr. Lowry the opportunity of being recalled in order to comment publicly on various matters was a breach of fair procedures. The Tribunal indicated that it would consider whether any further information that the applicant might wish to put before it would be appropriate to lead in evidence, but maintained its view that his entitlement to make any comment on other evidence heard should be done by way of written submission. Mr. Brady contends that Mr. Lowry did not bring to the attention of the Tribunal the existence of any additional or further information that he wished to provide by way of evidence. Mr. Lowry availed of the opportunity to make further submissions and the Tribunal concluded that there was no need or requirement for him to give any further evidence. In addition, the applicant has never previously brought any legal

challenge against the procedures of the Tribunal in this regard, either at the time of the exchange of correspondence or following the publication of its report, notwithstanding that the procedures, insofar as they are relevant to the applicant, had been in existence since 2008.

39. The applicant in his replying affidavit contends that it was unfair that the Tribunal purported to make grave findings as to motive and conclude that he participated in a conspiracy to undermine the Tribunal's inquiries without any evidence being adduced by any witness before the Tribunal to that effect, and without ever putting those allegations to him in evidence so that his response and the credibility thereof could be assessed. In particular, the applicant emphasises the allegation regarding his involvement in falsification of documents and the provision of false evidence or information to the Tribunal, which he contends forms the main theme of Chapter 8 of the Tribunal's report and "the core pillar of the costs ruling". The applicant complains that a different standard was applied to other witnesses who were recalled and states that he seeks discovery in respect of the correspondence which resulted in their recall for the purposes of better demonstrating the inconsistency of the Tribunal's approach in this regard.

40. In his second replying affidavit Mr. Brady rejects the contention made by the applicant that the respondent refused his request to be heard and give evidence in relation to the provisional findings. He states that at all material times the Tribunal was informed by Mr. Lowry's solicitors that he wanted to be recalled so that he could "comment" on matters and not because he had additional information to be led by way of evidence. The course of that correspondence is set out in the affidavits of Mr. Lowry and Mr. Brady, and is available to the parties. The procedure adopted was set out by the Tribunal in a ruling of 29th September, 2005. Having considered the affidavits in which this issue is addressed in detail by the applicant and Mr. Brady, and from which it appears that the entire correspondence in relation to this issue is available to both parties and the court, I am not satisfied that documents and correspondence between witnesses or their representatives in the Tribunal concerning the provision of further evidence subsequent to the circulation of the provisional findings is relevant to the issues in this case. These matters are clearly addressed in the pleadings and affidavits and the exhibits therein contained. Even if the further documents sought were thought to be relevant to the court's understanding of the course of events in this case, I am not satisfied that it is necessary for the fair trial of the issues between the parties that an order for discovery be made, having regard to the pleadings and evidence already available to the court. Furthermore, I am of the view, having regard to the extensive evidence and materials available, that an order for discovery under this heading would be entirely disproportionate having regard to the breadth of discovery sought and its further cost.

### **Category Three**

41. Under this heading, the applicant seeks discovery of all documents or orders relating to any arrangements whereby the Tribunal made interim arrangements with appropriate government departments to defray or discharge costs of parties represented before it. This aspect of the application was said to relate to the declarations sought that the manner of the application and construction by the respondent of s. 6(1) (a) of the 1979 Act, as amended, is contrary to the provisions of Bunreacht na hÉireann and that in withholding two thirds of the applicant's costs, the respondent has failed to perform its functions in a manner compatible with the applicant's rights under the European Convention on Human Rights. In this regard the applicant claims that he made application on a number of occasions, including on 26th October, 2010, seeking interim orders as to his costs of representation as he did not have the financial means to continue to engage representation before the Tribunal. These applications were refused, but the Tribunal made arrangements with appropriate government departments to defray or discharge costs of particular persons notwithstanding final costs orders had not been made by the Tribunal. It is claimed that because the Tribunal sat for an extraordinarily long period the applicant was grossly under resourced as compared with the other main parties, and suffered acute and continuing prejudice. It is claimed that disclosure of this category of document is necessary and relevant to adjudicate upon the consistency of the approach adopted by the Tribunal to interim arrangements regarding costs.

42. The only reference in the amended statement of grounds to interim costs orders is that contained in para. 35, in a section which described the background of events to the applicant's claim. Para. 35 is not contained in the section headed "Specific Grounds in respect of Relief Sought". There is no specific reference in the grounds related to the declaration sought in respect of s. 6(1) (a) and set out at paras. 110 – 114 (inclusive) to any challenge to the refusal of interim costs awards by the Tribunal. The court is, therefore, satisfied that this category of documents is entirely irrelevant to the issues to be determined in these proceedings. It is not necessary for the fair determination of any of the issues that arise. The court does not propose to make any order for discovery under this heading.

### **Conclusion**

43. For all of the above reasons, the court will make an order for discovery of documents in the terms of para. 34 above.