Neutral Citation Number: [2008] IEHC 282

THE HIGH COURT

2007 No. 80 JR

BETWEEN/

HAZEL LAWLOR

APPLICANT

AND

THE MEMBERS OF THE TRIBUNAL OF INQUIRY INTO CERTAIN PLANNING MATTERS AND PAYMENTS

RESPONDENTS

Judgment of Mr. Justice Roderick Murphy delivered the 31st day of July, 2008.

1. The first issue which arises in this judicial review is the standard of proof required before findings of fact are made by the Tribunal. The second issue is effective legal representation in terms of provision for costs in relation to the anticipated hearings before the Tribunal. The application by way of Judicial Review was limited at the leave stage as appears below.

1. Standard of proof

2. The submissions on behalf of the applicant made by Mr. McGonigal S.C. related to the issue of standard of proof and, rather helpfully, the Court was given comprehensive overview of the issue dealt with by many inquiries and tribunals, both in this jurisdiction and elsewhere. It is clear, and indeed accepted by the applicant, that Tribunals of Inquiry deal with the finding of facts rather than with the administration of justice. The Court is asked to consider and to take into account the period of time that the present Tribunal has taken. One could probably contrast the earlier fact finding inquiries as being restricted to technical evidence and to findings of causation in the physical sense with the present Tribunal investigating planning matters, possible interference with matters relating to planning decisions and so forth which necessarily involve the reputations of witnesses, perhaps more fundamentally than the earlier Tribunals did.

3. Counsel referred to the terms of reference of the Tribunal, which included, *inter alia*:-

> "In the event that the Tribunal in the course of its inquiries is made aware of any acts associated with the planning process, which, may, in its opinion amount to corruption or which involved attempts to influence by threats or deception or inducements or otherwise, to compromise the disinterested performance of public duties, it shall report on such acts and shall in particular make recommendations as to the effectiveness and improvement of existing legislation governing corruption in the light of its inquiries."

4. The then chairman of the Inquiry, Flood J., on 21st October, 1998, indicated that "corruption" was understood as,

> "As including, destroying, injuring or perverting the integrity or fidelity of a person in the discharge of his duties or the abuse of influence or power or duty by any person or to bribe or to induce another to act dishonestly or unfaithfully or an attempt to do the same, or circumstances of control, influence or involvement with such person to the extent that it gives rise to reasonable inference of unequal accessive or favouritism or to a set of circumstances detrimental to his duties."

5. Counsel said that it was understood that the allegations which the applicant's spouse, the late Mr. Liam Lawlor was facing were of the most serious kind in the sense that they could lead to findings of criminal behaviour.

6. Where there is a reference to standard of proof, the vast majority of Tribunal reports refer to civil standards of proof. The issue is not one of proof as in civil litigation, but rather of fact finding. The references by Chairman of Tribunals are to degrees of certainty and probability when dealing with more serious matters. The exception to that was the Beef Tribunal in relation to which a standard of proof beyond reasonable doubt was adopted.

7. The report of the Tribunal of Inquiry into the Beef Processing Industry at paragraph 10 stated:-

> "Because of the seriousness of the allegations and because of the potential damage to the reputations and good names of the persons against whom the allegations were made, and the risk of personal hurt and injustice to any person involved in the inquiries, the Tribunal was from the outset, concerned and indeed obliged to have regard to the principles of natural justice in the conduct of its inquiries and to ensure that fair procedures were adopted by it."

8. The Supreme Court in *Goodman v. Hamilton* had referred to the discretion of the Tribunal in relation to what standard it might adopt. Hederman J. held that it might not have been necessary for the Tribunal to set up a standard beyond a reasonable doubt. It was a procedural requirement which was well within the competence of the Tribunal to lay down. In *Haughey v. Moriarty* Hamilton C.J. stated that first of all, a preliminary investigation was required of the evidence available. Secondly, the Tribunal had to determine of what it considered to be evidence relevant to the matters in which it was obliged to inquire. Thirdly, such evidence had to be served on persons likely to be affected thereby. The fourth stage was 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. Fifthly, was the preparation of a report and the making of recommendations based on the facts established at such public hearing. Probably the *In re Haughey* rights to which reference has been made on behalf of the applicant, that is to say the right to make submissions with regard to the findings could be added.

9. The question of the Medical Council cases and particularly *Georgopoulus* and *O'Laoire v. Medical Council*, appears to have moved the matter forward somewhat in relation to the question of the standard of proof. O'Flaherty J. examined the law in relation to the standard of proof and was minded to maintain a distinction between the two standards of civil and criminal trials, but said to attempt to introduce the procedures of a criminal trial into essentially civil proceedings served only to create confusion, echoing what Barrington J. had said in *Mooney v. An Post*. O'Flaherty J. then said:-

> "The common law panorama at this time gives the impression that there is but one standard of proof in civil cases though of necessity it is a flexible one. This flexibility will ensure that the graver the allegations, the higher will be the degree of probability that is required to bring home the case against the person whose conduct is impugned."

10. In *Georgopoulus*, where the applicant was a medical registrar who argued that the Medical Council should have applied a criminal standard of proof in the employment inquiry, Hamilton C.J. said it was in essence a purely civil proceeding and did not involve in any way allegations of a criminal nature. He continued:-

> "It is true that complaints against the plaintiff involve charges of a great seriousness and with serious implications for the plaintiff's reputation. This does not, however, require that the facts upon which the allegations are based should be established beyond all reasonable doubt. It can be dealt with on the balance of probabilities bearing in mind that the degree of probability required should always be proportionate to the nature and gravity of the issues to be investigated."

11. In re *H (minors)* [1996], the House of Lords referred to the establishment of principles regarding the standard of proof as follows:-

> "Where the law sought to define the degree of probability appropriate for different types of proceedings. Proof beyond a reasonable doubt in whatever form of words expressed is one standard. Proof on a preponderance of probability is another lower standard having the inbuilt flexibility already mentioned. If the balance of probability standards were departed from and a third standard was substituted in some civil cases, it would be necessary to identify what the standard is and when it applies. Herein lies a difficulty. If the standard were to be higher than the balance of probability but lower than the criminal standard of proof beyond a reasonable doubt, what would it be? The only alternative which suggests itself is that the standard should be commensurate with the gravity of the allegation and the seriousness of the consequences."

12. A formula to this effect has its attraction but I doubt whether in practice it would add much to the present test in civil cases and it would risk causing confusion and uncertainty. As present advised, I think it better to stick to the existing established law on this subject. In that case, the House of Lords was dealing with litigation and not with a Tribunal of Inquiry or any form of investigation.

13. In *B. v. Chief Constable of Avon and Somerset* [2002] 1 W.L.R. 340 Bingham L.J. at 353-354 stated that:-

> "In a serious case such as the present the difference between the two standards is, in truth, largely illusory. I have no doubt that in deciding whether the conditions in section 2 (1)(a) is fulfilled, a magistrates court should apply a civil standard of proof which will for all practical purposes be indistinguishable from the criminal standard."

14. That related to proceedings for the obtaining of the sex offender order.

15. References to other jurisdictions have no real bearing other than by way of analogy with the position here. Neither the Tribunal of Inquiries Act, 1921, nor the amending legislation touch on issues in relation to standard of proof.

16. The issue of the Plaintiff seeking to deal with her late husband's good name is a matter of course that has been canvassed and arguments have been made that that is an entitlement which the applicant has in relation to the defence of her husband's reputation. There are two matters which the Court will refer to. First of all, that leave was not granted in relation to those matters. Secondly, the question of defamation, notwithstanding recommendations for change of the Law Reform Commission, is a matter which is already settled in law.

17. The Court has regard to the submissions made on behalf of the respondents in this case and, in particular, the reference to beyond a reasonable doubt being confined in most cases except in very very limited exceptions to criminal cases. A reference was made to the beyond a reasonable doubt in relation to the *Banco Ambrosiano* and *Ansbacher* case in relation to the question of fraud. This seems to me an important analogy, that is to say when fraud has to be proved in a criminal court as an element of offence charged, it must, of course, be proved beyond a reasonable doubt which is the prescribed degree of proof for every essential agreement of a criminal charge. Henchy J. in the Supreme Court held:-

> "In civil cases where a fraud is not recognised as a distinct tort or cause of action, it is well recognised as an element which, if proved in the appropriate manner, will vitiate the act or conduct which it induced or resulted in so that the court will seek to undo the intended and actual effect of the fraud by awarding damages or making such order as it deems necessary for the purpose of doing justice in the circumstances."

18. This seems to me to be an example within civil proceedings where matters are alleged which are of a criminal nature. Clearly if the standard is not that of a criminal standard in relation to the proof of fraud which has a *vitiation* effect on contract etc., it seems to me that, a *fortiori*, matters of fraud, or indeed any other criminal matter, which arise in a tribunal of inquiry can be dealt with without there being a higher standard of proof. This is particularly so where the essence of the Tribunal's work is fact finding rather than attribution of blame.

19. Indeed, in the medical cases, *Georgopoulus* and *O'Laoire*, Hamilton J. pointed out that proceedings before the defendant were of a civil nature and did not involve any allegations of criminal offence and standards of proving the case beyond a reasonable doubt was confined to criminal cases.

20. This matter also arose in *Goodman* where in the High Court Costello J.referred to the Terms of Reference in the *Goodman* case and:-

> "... required the Tribunal to inquire into the true or falsity of a number of allegations of wrongdoing, including assertions that the criminal law had been breached, but inquiring into these allegations and in reporting his opinion on them, the Tribunal is not imposing any liability or affecting any right. It is not deciding any controversy as to the existence of any legal right. It is not making any determination of the rights or liabilities and it is not imposing penalties. It may come to the conclusion that some or all of the allegations of wrongdoing are true, but this opinion is devoid of legal consequences. Its functions of inquiring, reporting and recommending cannot therefore be regarded as the administration of justice. The Tribunal is not exercising a judicial function in the sense of allegations of criminal behaviour. It is not trying anyone on a criminal charge."

21. Finlay C. J. in the Supreme Court appeal, found that:-

> "The essential agreement of a trial of a criminal offence in our law which is indivisible from any other ingredient is that it had before the court or a judge which has the power to punish in the event of a verdict of guilty. The proceedings of the inquiry to be held by this Tribunal had none of these features. The Tribunal had no jurisdiction or authority of any description to impose a penalty or punishment, nor can it form any basis for the punishment by any other authority of that person."

22. In relation to the present application, notwithstanding the issue of reputation which arose in *Maguire v. Ardagh* (see below) and the necessity of affording rights of representation and of submissions, it does not appear to me to alter the Supreme Court distinction between the imposing of a penalty in cases of criminal matters and the finding of facts in relation to tribunals.

23. Counsel for the applicant, submitted that there should be a tribunal standard of proof. While this has some conceptual attraction insofar as being something distinct and by its name appropriate to the tribunals, it doesn't seem to the Court that it can help in relation to the distinction between fact finding on the one hand and allowing tribunals their discretion in the finding of facts, while at the same time affording all opportunities to witnesses to make submissions that they think appropriate. A tribunal standard of proof would necessarily be a sliding scale, and that is perhaps some of what appears to be an attraction of such a standard that it could be degrees of probability of a higher standard in relation to more critical matters. To my mind that would be to undermine, first of all, the discretion that a tribunal has in finding facts and also impossible if it had to pin on each of its findings a degree of probability. Clearly it can't do that in a mathematical sense, it may do it on the sense of probabilities.

24. It does seem to me in any event this is a matter in respect of which leave was not granted and it is not in the Statement of Grounds despite its conceptual attraction.

25. Indeed, in the reference made by O'Flaherty J. in *O'Laoire v. Medical Council*, is in a minority judgment. The majority judgment was given by Murphy J. and no indication was given by any members of the court to the reference of what, in any event, O'Flaherty J. had described as "*an excursus*".

26. The respondent's analysis of the cases is interesting in relation to whether there are phrases that equates with 'civil balance of probabilities' or 'criminal beyond reasonable doubt'. There were references in the BTSB Tribunal report to being 'beyond doubt'. Again, that seems to this Court to be devoid of any tone of either civil or criminal proof. Finlay C. J. spoke about the most probable explanation which perhaps accords more to the civil rather than the criminal. Keane J. in *Stardust* referred the *most probable* explanation of the fire was that it was caused deliberately, and the Tribunal was satisfied that it was *probably* caused in a certain area of the Stardust.

27. Counsel for the applicant referred to *re Haughey* in terms of the rights of parties. The respondent said it is important to bear in mind that nowhere in *re Haughey* was it suggested that the criminal standard of proof should be applied. Notwithstanding the Haughey rights as we understand them and the development of those since 1971, it doesn't appear there is any indication that there should be a criminal standard of proof. It is clear from a consideration that the Supreme Court regarded it as essential that a party in the position of Mr. Haughey in that case should have the following protection, and I quote:-

> "The minimum protection which the State should afford was that he should be furnished with a copy of the evidence which reflected in his good name, that he should be allowed to cross-examine by counsel his accuser or accusers, that he should be allowed to give rebutting evidence and that he should be prepared to address by counsel the committee in its own defence."

28. The applicant submitted that although she had been granted the right to represent her husband, the restrictions put on that right and confirmed by O'Neill J. in the decision of 27th April, 2007, meant that he did not have the benefit of his *In re Haughey* rights. O'Neill J. held that:-

> "The applicants *locus standi* to defend the reputation of Liam Lawlor arises solely from the grant of representation to her in that regard by the Tribunal and extends no further than that. The general law precludes any further incursion into a sphere of forensic activity, which I am satisfied on the authorities, is excluded from legal redress." (19)

29. This seems to be an issue unrelated to the standard of proof.

30. In *Maguire v. Ardagh* [2002] 1 I.R. 385, the Supreme Court considers the meaning of the word "findings" in the context of a challenge to the procedures adopted in the Abbeylara Inquiry. The Supreme Court rejected the argument that the findings should be regarded as nothing more than an expression of opinion. Hardiman J. stated at 668:-

> "I've no doubt that the phrase, according to its ordinary and natural meaning, describes a rigorous analytical process leading to factual conclusions, conducted by a body uniquely equipped or authorised to do so. It is the diametric opposite, in my view, of the sort of opinion expressed about a work of art or music: matters of taste and artistic impression are known to vary from person to person and not to be susceptible of rigorous, objectively justifiable, demonstration. When it is recalled that the hypothetical finding of fact in this case might involve defining a serious as "unlawful killing", made by a parliamentary subcommittee acting under the authority of both houses, I believe that it is quite fanciful to consider that a reasonable man or woman in the street would not regard a report so phrased as a solemn finding of demonstrated wrongdoing."

31. A majority of the Supreme Court agreed with the analysis. McGuinness J. stated that the argument that the findings were no more than opinions because they had no legal effect and no legal penalty did not mean that they were without effect:

> "Their findings would be the result of an inquisitorial process, held in public, and in reality would be accepted by the public at large as being "the true facts". This would have the power to inflict enormous damage on the individual gardaí involved." (at 617)

32. In *O'Callaghan v. Mahon* [2006] 2 I.R. 32, Hardiman J., stated:-

> "The tribunal in the end of the day merely reports its opinions and makes recommendations. It does not make binding findings of fact, although its report can, of course, have the effect of vindicating some persons and utterly destroying the reputations of others"(at 74).

33. He had previously referred to the ability of the Tribunal to potentially make very grave findings which, if true, would constitute breaches of criminal law and would be a clear and obvious attack on the good name of the applicant.

34. The Court considers that, given that it is not the function of the Tribunal to attribute blame that the consideration of the Supreme Court does not require proof beyond reasonable doubt.

35. In the *Director of Corporate Enforcement v. Bailey* where there was an attempt by the Director of Corporate Enforcement to rely on an interim report of the Tribunal as against the Directors of Bovale Developments. Irvine J. ruled the report could not be relied upon and in her judgment she said:-

> "Costello J. in *Goodman International v. Hamilton* in dealing with the result of evidence being applied to a hearing before

> the Tribunal of Inquiry said there is no rule of law which requires the Tribunal of Inquiry to apply the Rules of Evidence applicable in a court of law."

36. This is indicative of the discretion to which those chairing or a tribunal dealing with the finding of facts being restricted to Rules of Evidence as applicable in the court of law.

37. Irvine J. also referred to *Lawlor v. Flood* where Murphy J. described the nature of the work of a Tribunal of Inquiry and its reporting function in the following manner:-

> "It must be remembered that the report of the Tribunal, whilst it may be critical and highly critical of the conduct of a person or persons who gave evidence before it, is not determinative of the rights, the report is not even a stage in a process by which such rights are determined. The conclusions of the Tribunal will not be evidence either conclusive or prima facie of the facts found by the Tribunal."

38. The Supreme Court in *Lawlor v. Flood* [1999] 3 I.R.107 at 137, per Denham J. contrasted proceedings in court with those of a tribunal where the witness is not a party. Counsel for the applicant contrasted the position in criminal law in the case of the death of a defendant with the position of the late Mr. Lawlor before the Tribunal. It was submitted that leave was not granted by O'Neill J. for that ground. Reference was made to *Murray v. Commission to Inquire into Child Abuse* where Abbott J. said that deceased persons have no constitutional right to their good name or reputation. The matter also arose in *McDonnell v. Brady* [2001] where Keane C. J. referred to the position of the late Mr. McDonnell, the spouse of the applicant and while recording the fact that the committee had given the applicant representation before it in order to defend her late husband's reputation, did not address the legal issue as to whether she had a legal entitlement to defend that reputation.

39. It is useful to bear in mind the statement of the Supreme Court of Canada in *Canada (H.E.) v. Canada (Commissioner Inquiry on the Blood System)* [1997] 3 S.C.R. 440 that a commissioner should endeavour to avoid setting out conclusions that are couched in the specific language of criminal culpability or civil liability for the public perception may be that specific findings of criminal or civil liability have been made. The inquiry into alleged sexual abuse of children chaired by Sir Ronald Waterhouse adopted the civil standard of proof and noted at para. 6.05 as follows:-

> "We should say at once that we accept without reservation the gravity of a finding of sexual abuse and it will be apparent from our report that there are very few such findings in our report except those that we make in respect of persons who have already been convicted of sexual offences against children in care."

40. It does seem to me having regard to the submissions made and the case law which the Court has examined that there is no necessary standard of proof laid down in relation to Tribunals of Inquiry. The Beef Tribunal did take, and Hederman J. acknowledged it was entitled to take, a higher standard of proof but that it wasn't necessary for it to do so. In other cases it would appear that the standard of proof is beyond a reasonable doubt and in other cases again that there is no specific reference to standard of proof but there are determinations beyond doubt or on a high degree of probability or on the basis of probability. It does seem to me accordingly that the application for reliefs that the respondents may not make any findings of serious misconduct against the late husband of the applicant unless supported by evidence proven beyond reasonable doubt is not substantiated by the arguments and submissions made.

2. Effective legal representation

41. The Court will now turn to the second issue before it and that is the question of legal representation.

42. The applicant seeks an order directing the respondents to make all necessary financial arrangements to enable her to engage effective legal representation for herself in the course of proceedings before the respondents. She also seeks a declaration that the respondents' failure to provide financial assistance to enable her to engage effective legal representation of the proposed Inquiry being conducted by the respondents constitutes a failure on the part of the respondents to conduct the said Inquiry in accordance with fair procedures and was in violation of fair procedures in accordance with which the respondents were required to conduct their business. It is claimed that the failure to provide the applicant with the means by which she might secure effective legal representation at the said Inquiry being conducted by the respondents constituted a breach of her constitutional rights. A declaration was sought that the provisions of the Tribunals of Inquiry Acts, 1921 to 2002, when properly constituted permitted the respondents to provide or to cause to be provided to the applicant legal representation or sufficient means to enable the applicant to secure legal representation at the hearing of the Inquiry to be conducted by the respondents.

43. A more radical relief was sought that an injunction was also prayed restraining the defendants from continuing with any public hearing until the notice parties took reasonable steps to provide the applicant with financial assistance, the notice parties being Ireland and the Attorney General, but, as has already been mentioned, it appears that the State was not a party to the matters before this Court.

44. The Court has considered the submissions made by Mr. Giblin S. C. in this regard. Counsel referred to the decision of Judge Mahon on 29th November 2005, which was Day 603 of the hearings, where he said:

> "In relation to costs, I think you know as well as anyone that our hands are tied. We are not in a position to provide for costs in advance of the conclusions of the module in the normal course of events after a report has been furnished or after a report has been prepared or published. Even in circumstances where an individual is unable to pay for his/her legal representation, that particular issue, I think you know, has been well flagged and argued in another Tribunal and to some degree in this Tribunal before, but certainly to a greater extent in another Tribunal. There is no legislative provision which would allow us to direct that Mrs. Lawlor or the estate of Mr. Lawlor should get their costs at this stage or could in any way be guaranteed their costs."

45. Mr. Giblin said the provisions of s. 6 of the Tribunals of Inquiry (Evidence) Act are one element, but that the Tribunal had an inherent power to provide for costs in any event. s. 6(1) as amended, states:-

> "Where a Tribunal, or if the Tribunal consists of more than one member, if the Chairperson of the 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 cooperate 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, on application by any person appearing before the Tribunal order that

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, and
>
> (b) incurred by the Tribunal as taxed or aforesaid should be paid to the Minister for Finance by any other person named in the order."

46. It appears that before the enactment of s. 6 all Tribunals could do was recommend that the costs be paid by the State. The provision in s. 6 enabled the Tribunal itself or its Chairman to order costs be paid. The question arises whether that can be done before or after the Tribunal has finished with its deliberations. Secondly, does the Tribunal have an inherent power otherwise to provide for costs?

47. It is clear that the preamble to the right to award costs only arises having regard to the findings of the Tribunal and any other relevant matter. That necessarily pre-supposes that the Tribunal has made findings and, indeed, has considered whether witnesses have or have not cooperated with or provided assistance or have knowingly given false or misleading information. It is only then that the Tribunal or its Chairperson can determine that there is sufficient reasons rendering it equitable to do so to order costs. The provision seems to be clear. The only matter then is whether the legislation is a definitive statement of the powers of the Tribunal. Counsel submitted that it didn't purport to do so.

48. Counsel referred to the English comprehensive statutory framework. Counsel referred also to English authorities in relation to Law Reform Commission and Keeton on *Trial by Tribunal*, to the effect that there is an inherent right in a Tribunal to award costs. The first point that probably is quite clear is the Tribunal of itself does not have the funds to award costs. Funds are to be defrayed from the Oireachtas. To that extent it would seem clear that unless there is a statutory provision such as s. 6, the Tribunal could not of it own motion award costs. Counsel referred to the Hepatitis Committee having been given an undertaking with regard to costs at the beginning of the Lindsey Tribunal. It is not clear whether whatever discretion the Tribunal may have it would under the Statute be limited to findings.

49. Counsel referred to *McBrearty v. Morris* and to *K Security & Kavanagh v Ireland*.

50. Probably that was the reference which Judge Mahon made to the matter being dealt with in other Tribunals. In *K Security & Kavanagh*, Gannon J. applied the ordinary rules of statutory interpretation and said:-

> "There is nothing in the 1921 Act which states or implies that a Tribunal to which the Act may be applied has or has any power or authority over costs by whomsoever incurred in the proceedings. The fact that a Tribunal to which the Act may be applied is empowered by the Act to authorise interested parties to be represented before it is no basis for implying that the Act confers authority on such a Tribunal to award the costs of such representation to those parties at the expense of or as a charge upon the public funds. The public funds are entrusted by the Constitution to the care of the Government, subject to the strict control and supervision of the legislature upon whose resolution in both Houses of the Oireachtas the Constitution and authority of this Tribunal are founded."

51. Counsel submitted *K Securites v. Kavanagh* dealt with a witness who is not in the position of a potential accused and he contrasts that with the present case where Mr. Lawlor is, he said, definitely in the latter position.

52. The Court can find no basis, nor indeed are there grounds where the late Mr. Lawlor had been regarded by the Tribunal as an accused or as a potential accused. Counsel submitted that, Gannon J.'s decision did not deal with the inherent power that a tribunal had to direct the public funds might be afforded to witnesses. However there would appear to be no such inherent power.

53. In *Goodman v. Minister for Finance* the plaintiffs were claiming interest on costs payable on foot of cost orders made by the Tribunal and the defendants argued they were not liable for interest. Laffoy J. said:-

> "In the past it was regarded as anomalous that the most a tribunal of inquiry could do was to 'recommend' to the Attorney General that certain costs should be paid out of public funds. Section 4 does no more than increase the efficiency of tribunals. Many administrative tribunals, as well as an inquiry such as this Tribunal, are clothed with what history has shown are efficacious powers when exercised in the courts. The fact that powers similar to those exercised by the High Court are conferred on a particular administrative Tribunal or Tribunal of Inquiry does not constitute such bodies courts."

54. Laffoy J. placed considerable emphasis on the *K Security* case in that regard. Mr. Giblin said that she didn't consider the question of whether the Tribunal might have a power totally outside the Tribunals of Inquiry legislation.

55. In *McBrearty* there were similar issues where the applicant had been granted the right to be legally represented before the Tribunal and argued he was unable to fund legal representation in the absence of being provided the means to do so. He argued the right to be legally represented was of no benefit in circumstances where he could not afford to exercise the right. The Tribunal argued that it was not entitled to grant legal aid under the Civil or Criminal Legal Aid Schemes or to make a recommendation under the Attorney General Scheme. It was argued it had no power under s. 6 to adjudicate on the issue of costs or to direct the payment of costs of any person appearing before the Tribunal prior to reaching any findings on the matter being investigated. Peart J. dismissed the applicant's claim and in the course of his judgment he considered the powers of the Tribunal to award costs under the Tribunals of Inquiry legislation and the constitutionality of section. 6. He concluded it was clear that the only power the Tribunal enjoys to make any order in relation to costs is contained in that section and that the matter was considered by Laffoy J. in *Goodman v. Minister for Finance*. He was completely satisfied the Tribunal had no power under the section as contended by the applicant, namely to make provision for or at least guarantee in advance the cost of the applicant's legal representation or those of his family or extended family.

56. This is a matter which the Court observes has already been decided by the High Court in two stages. First of all, that the only power the Tribunal had was to make a costs order under this section. Secondly, the Tribunal had no power to make provision for costs in advance of an applicant's legal representation. Counsel pointed out that the reference by Peart J. was to the Tribunal having no power under the section and that accordingly the matter is still open. Mr. Giblin also submits that in the particular case Mr. Lawlor was the focus of the Inquiry's intention. I think that might be limited to certain modules, though Counsel's submissions seemed to relate to the entirety of the Inquiry.

57. One further matter arose in relation to the end of judgment of Peart J. where he said:-

> "If there was in any way in which a point could be stretched in relation to the various issues I have had to decide, so as to find that the position of the applicant and his family was so different as to not require me to follow the decisions to which I have referred, I would have been prepared to do so, not just in the interests of the applicant, but in the interest of the Tribunal itself."

58. Counsel said that undermined the reliance being put on the decision as authority for the general proposition that the Tribunal had no power to deal with costs apart from section 6.

59. Mr. Giblin referred to instances in the Beef Tribunal and in the Moriarty Tribunal where arrangements were made in respect of the costs of certain witnesses, and I will now examine that submission.

60. In the Beef Tribunal Report, Hamilton J. recorded that in order to secure the attendance of a witness from a foreign jurisdiction, he recognised and allowed the individual's legal costs and expense. Again, this clearly was a payment made before the report had issued and it was contained in the report. The Chairman of that Tribunal said:-

> "Eventually, in view of the importance of Mr. McGuinness' evidence, the Tribunal was obliged to accept the conditions imposed by Mr. McGuinness and to treat his legal costs and his expenses necessarily incurred in connection with his attendance before the Tribunal."

61. Mr. Giblin comments that the only difference between the applicant and Mr. McGuinness is that she is resident in the jurisdiction; what basis was there for paying these legal fees if it is not an inherent power of the Tribunal. That is, of course, a distinguishing feature. Witnesses are compellable within the jurisdiction and not without the jurisdiction and if, as was recorded in the report, it was thought that somebody was an essential witness from a foreign jurisdiction, that is a distinguishing feature. What is also necessary, is to have sanction from the Minister for such costs to be costs of the Tribunal.

62. It is not clear whether these costs were considered to be costs of the Tribunal itself or whether approval had been obtained from the Minister of Finance.

63. In the Moriarty Tribunal, similar circumstances arose in relation to the evidence of Mr.Vaughan where on Day 340, the witness giving evidence was informed by counsel for the Tribunal that the Tribunal had offered to pay personal and legal costs of an individual they wished to meet in London. Having said that, the Court acknowledges that those Tribunals did deal with costs before the report issued but that is not clear on what basis such offer was made.

64. In the Morris Tribunal on the application for representation, the question of *viaticum*, that is to say the witnesses' expenses were dealt with on the Tribunal's own motion.

65. Mr. Giblin says this is an instance of an inherent power of that Tribunal to deal with the matter of expenses.

66. There are further references to the Tribunal of Inquiry in relation to the Bloody Sunday Inquiry and to the applications being made to the solicitor, not just for representation, but also for costs. It seems to me that is not a precedent within this jurisdiction that this Court can follow. In any event, it was not made clear what powers Lord Saville may have had to make such arrangements.

67. The recommendations of the New Zealand Law Commission while they are of interest, are not relevant to the position in this country. Mr. Giblin had submitted that one of the recommendations, referred to the:-

> "... denial of funds to pay counsel for a person who is subject to adverse comment and cannot afford a lawyer is essentially the denial of a right to counsel."

68. The question of legal aid was a matter that was dealt with by the Royal Commission of Inquiry in 1966 in the United Kingdom. Where a witness did not qualify for assistance under the Legal Aid Scheme counsel urged that a tribunal would have to be satisfied that *prima facie* the witness' financial position qualified him for legal aid and that it was reasonable in all the circumstances that he be represented. Indeed, in the Inquiries Act in the United Kingdom, counsel referred to provision for witness expenses, and said that could be dealt with on the basis of the inherent powers of Tribunals in this jurisdiction. While he was not contending that the English Act applied it appears that the inclusion of such a provision in the Act suggested that there was no inherent power.

69. The Court feels that the matter has been dealt with in Peart J.'s decision both in terms of the exhaustive natures of inquiry under s. 4 or s. 6, and that those sections circumscribe the right of tribunals to pay only on the finding of facts.

70. Though the Court acknowledges that no evidence was adduced in relation to that matter, that there may be arrangements which have been made in relation to foreign witnesses or meetings outside this jurisdiction which require witnesses to be paid. It does seem to me that that is an entirely separate matter where the costs of witnesses are deemed costs of the Tribunal in relation to which presumably the Minister for Finance has agreed, but it does not seem to be a matter which arises out of an inherent power of a tribunal to deal with the issue of costs.

71. The Court has considered counsel's submission in relation to *Fayed v. United Kingdom* which he said was cited as authority for the general proposition that the European Court of Rights Article 6.1 did not apply to inquiries. In making his submission that not alone was there a right to be effectively represented, but that this right was also a constitutional right. He referred to *Airey v. Ireland* and to *Andronicou & Constantinou v. Cyprus* and more at length to *Steel & Morris v. United Kingdom* and the so-called 'Mc Libel' case where the complainant was faced by a large legal team on behalf of McDonalds and his complaints against McDonalds, and the question of disparity of legal representatives and equality of arms were raised. That was a civil litigation and, accordingly, it is not a matter which the court can use as a ground for going against what appears to be clear principles established by Peart J.

72. The Court is also mindful that neither the State nor the Minister is a party to the proceedings and though initially they were named as a party, the applicant did not seek to keep the State as a party, and that seems to me to be relevant in relation to the nature of the reliefs that were sought.

73. It is clear that the judgment of Peart J. is to the effect that the Tribunals have no inherent power to provide for the applicant's costs. Peart J. followed the approach adopted by Laffoy J. in *Goodman v. Minister for Finance*.

74. Mr. McDonald S.C. relied on the judgment of the Supreme Court in *Lawlor v. Flood* in this regard as well as in regard to the previous issue, where Hamilton C. J. said:-

> "Such powers as were granted to the Tribunal were limited to the powers vested in the High Court on the occasion of an action and related only to the enforcement of the attendance of witnesses, their examination on oath, affirmation or otherwise and the compelling of the production of documents. It is clearly the intention of the legislature and so provided by the Act of 1921 that the powers given to the Tribunal were limited to and did not exceed the powers vested in the High Court on the occasion of an action."

75. The powers of the High Court in awarding costs are not included. The reference by the Chief Justice was to *limited* powers restricted only to the enforcement of attendance of witnesses, their examination on oath and the production of documents. Indeed, the respondents submit that the High Court itself has no jurisdiction to order that the costs of a party before it should be paid by the State or the High Court itself in advance. This was so even in cases where the allegations of the most serious kind such as fraud, deceit, conspiracy or conversion of goods were made against a party before it. If the High Court had no such power, then neither does the tribunal. The decision of the Supreme Court in *Dawson v. Irish Brokers Association* where lay litigants contended they should be entitled to recover costs on the same basis as a solicitor for preparatory work undertaken by them prior to a trial was rejected both by the High Court and the Supreme Court in reliance on *London Scottish Benefit Society and Chorley*, a 19th Century case where it was decided that costs were the creation of statute.

76. Indeed, in *Dawson*, Keane J. stated:-

> "It is a matter which must be for the legislature and the legislature alone to redress. It is noteworthy when they came to clarify the powers of the Taxing Master in respect of the taxation of costs as between party and party, they expressly refrained from making any alteration in the law."

77. In *Steel & Morris v. United Kingdom*, the libel case to which I have already referred, the court held in relation to the European Convention on Human Rights in criminal and civil proceedings:-

> "The Court recalls that the Convention is intended to guarantee practical and effective rights. This is particularly so of the rights of access to the court in view of the prominent place held in a democratic society by the right to a fair trial. It is central to the concept of a fair trial, in civil and in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court and that he or she is able to enjoy equality of arms with the opposing side."

78. It is clear from the decision of the Supreme Court in *Lawlor v. Flood* that the Tribunal hearing is neither a criminal trial nor a civil trial. On the premises the Court accepts the submissions that *Steel & Morris* has no application to the present case. Not only is that so, but the Court notes that there is no claim in these proceedings for a declaration of incompatibility with the European Convention.

79. There were other matters raised by Mr. Giblin when he referred to *McDonald v. Bord na gCon* in regard to a dispute about costs, but such matters were not included either in the Statement of Grounds which simply asked for costs in advance of the hearing. References to the applicant's personal circumstances, the charges on the family home and other matters of that nature, would not appear to be relevant. Public interest in relation to the evidence given by the applicant's late husband is not a matter that is of relevance as it deals with the past grievance. No leave was granted in relation thereto. No evidence was adduced in relation to the applicant's financial means.

80. The Court is conscious that the Tribunal has been ongoing for over a decade and, indeed, the affidavits filed on behalf of the applicant describe in considerable detail the complaints which the late Mr. Lawlor had with the Tribunal. The Court notes the opening of Mr. McGonigal's application to the Court that the Tribunal had made no findings against the late Mr. Lawlor. There was no evidence as to the responsibility for the length and the Tribunal's deliberations.

81. The current claim in relation to standard of proof from the question of costs of legal representation are both matters which could have been raised in Judicial Review proceedings by Mr. Lawlor in his lifetime. The bringing of this application years after his unfortunate death are outside the time fixed by O. 84, r. 21 of the Rules of the courts, and this should be the basis of the Court's discretion in refusing the relief. O'Neill J. in dealing with the applicant's application for a stay on the Tribunal proceedings in April of last year said:-

> "Having regard to the well known obligation of promptness required when initiating judicial review proceedings, I am not satisfied that these proceedings were moved with the required promptness or within the time set out in the rules of the Court. I am quite satisfied that these proceedings could have been commenced long before they were and that the delay has not been explained to my satisfaction."

82. It does seem to me that the submissions made in relation to the respondents have equal force and even greater force in relation to this particular application for judicial review. The Court also notes that no evidence was given by or on behalf of the applicant in relation to her means to have effective legal representation. The Court notes, but has not had an opportunity of examining the decision of my colleague, Laffoy J. yesterday 30th July, 2008, in relation to the costs issue which were dealt with in the application by the Tribunal as plaintiffs against Mr. Noel Lawlor, the administrator *ad litem* for the estate of Mr. Liam Lawlor and the applicant in the present case. Clearly the absence of evidence in relation to the matter makes it even more difficult again having regard to the limitation and the issue of costs by a tribunal and that costs be a matter of statute and ss. 4 and 6 now dealing with the matter, it would seem that the matter has been decided clearly by Peart J., as I have already mentioned.

83. Accordingly, for the reasons given I refuse the application for the reliefs sought and, in particular, firstly, will not make a declaration that the respondent may not make findings of serious misconduct against the late husband of the applicant unless supported by evidence proved beyond a reasonable doubt. Secondly, I will not make the orders and declarations sought in relation to effective legal representation for her in the course of proceedings before the Tribunal.