

THE HIGH COURT

[2013 No. 938 J.R.]

BETWEEN

ANTHONY FOX

APPLICANT

AND

JUDGE ALAN MAHON, JUDGE MARY FAHERTY AND JUDGE GERALD KEYES, MEMBERS OF THE TRIBUNAL OF INQUIRY INTO
CERTAIN PLANNING MATTERS AND PAYMENTS

RESPONDENTS

JUDGMENT of Ms. Justice Baker delivered on the 24th day of July, 2014

1. This judicial review is a challenge by the applicant to the decision of the respondent, made on 31st October, 2013, that the applicant failed to co-operate with the Tribunal and/or knowingly gave false and/or misleading evidence to the Tribunal.

2. On the 24th day of July, I delivered judgment in a related case of *Chawke v. Judge Alan Mahon & Ors* [2013 No. 299 J.R.] where somewhat similar, but not identical, matters arose for consideration. Those two cases were not heard sequentially and there was some time between the hearings, the above case having been heard by me first. The applicant in each case had different legal representation, but the respondent was represented by the same counsel. Some common factors arise.

3. The Tribunal of Inquiry into Certain Planning Matters and Payments, ("the Tribunal ") was established by instrument of the Minister for the Environment and Local Government on 4th November 1997, to enquire into certain alleged payments to politicians or others with a decision making role in planning matters. The Terms of Reference of the Tribunal were amended by various instruments between then and 3rd December, 2004, and *inter alia*, required the Tribunal to inquire into and make findings and recommendations in regard to the identity of all recipients of payments made to political parties or members of either House of the Oireachtas or members or officials of the Dublin local authorities or other public officials named, and to inquire whether the persons so receiving the monies were influenced directly or indirectly by the offer or receipt of any such payments or benefits. Paragraph C (b) of the Tribunal's Terms of Reference enable the Chairperson of the Tribunal to make decisions relating to applications for costs by individual parties and these applications were made and considered after the final Report was published on 22nd March, 2012.

4. The evidence of Mr. Fox was taken in respect of several of the modules of the Tribunal's hearings. The Tribunal found as a fact in its final Report that the applicant had received money from Mr. Frank Dunlop and that such payments were improper and/or corrupt payments. Mr. Fox gave sworn evidence to the Tribunal in the course of ten separate modules in which the Tribunal was seeking to establish whether the money was solicited by and/or paid to elected Dublin County Councillors in the course of the consideration of certain matters relating to rezoning of certain lands in County Dublin. Mr. Fox was an elected Councillor, and to that extent, was not merely a witness for the purposes of the Tribunal's inquiry, but was himself identified by Mr. Dunlop as a person who had received money in return for his vote in the rezoning of identified land. The evidence given by Mr. Dunlop was contested by the applicant who gave evidence over numerous days. Findings in ten of the eleven modules were made by the Tribunal that payments were made to the applicant by Mr. Dunlop and that these payments were corrupt.

5. The Tribunal having published its substantive Report, then invited submissions in relation to costs, and submissions were delivered by the applicant on 15th May, 2012. The respondent communicated on 31st October, 2013, its finding that the applicant had not co-operated with the Tribunal in relation to certain matters identified in ten separate chapters of the report.

6. It is that finding that is challenged in this application. The applicant also sought a declaration that the findings of the respondent were *ultra vires* the power of the respondent, but that ground was not argued before me.

The basis of the challenge and the response

7. The applicant challenges the finding of the Tribunal that he did not co-operate with the Tribunal on the grounds that it purported to make a finding which is inherently and logically linked to its substantive finding and in breach of the legal principles outlined in *Goodman v. Hamilton* [1992] 2 I.R. 542, and confirmed and developed by the Supreme Court in *Murphy v. Flood* [2010] 3 I.R. 136.

8. The respondents argue that the Tribunal had regard to the fact that false evidence was given by Mr Fox during the course of its hearings, and that in coming to its decision it was entitled to have regard to the fact that the evidence he gave was expressly contradicted by evidence from other witnesses whose evidence was preferred by the Tribunal.

The power to award costs

9. The Tribunal has power under s. 6 of the Tribunals of Inquiry (Evidence) (Amendment) Act 1979, as amended by s. 3 of the Tribunals of Inquiry (Evidence) (Amendment) Act 1997, to make awards of costs. The primary power contained ins. 6 of the Act of 1979 enables a Tribunal to order that the part of the costs of any person appearing before the Tribunal by counsel or solicitor shall be paid to the person by any other person named in the order. The costs order may be an order that a person appearing before the Tribunal be awarded some or all of his or her costs, or that such person should pay some or all of the costs of any other person so appearing. The amending legislation added in parenthesis the relevant matters to which the Tribunal must have regard in coming to its decision on costs. The full amended s. 6(1) reads as follows:

"(1) Where a tribunal or, if the tribunal consists of more than one member, 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 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. "

The two stage process

10. The jurisdiction of Tribunals of Inquiry in respect of costs has been considered in a number of cases, from which it is clear that the decision to award costs is one which must be separated from the substantive decisions of the Tribunal itself. This finds reflection in the amended statutory provisions. The clear statement of McCarthy J. in *Goodman v. Hamilton*, sets out the different process or decision making activities involved in the making of findings by a Tribunal on the one part, and its determination on costs on the other, at p. 605:-

"The liability to pay costs cannot depend upon the findings of the Tribunal as to the subject matter of the inquiry. When the inquiry is in respect of a single disaster, then, ordinarily, any party permitted to be represented at the inquiry should have their costs paid out of public funds. The whole or part of those costs may be disallowed by the Tribunal because of the conduct of or on behalf of that party at, during or in connection with the inquiry. The expression "the findings of the tribunal" should be read as the findings as to the conduct of the parties at the tribunal. In all other cases the allowance of costs at public expense lies within the discretion of the Tribunal, or, where appropriate, its chairman. "

As explained by Hardiman J. in *Murphy v. Flood* at para. 176:-

"Nevertheless, the supreme importance, in the public interest, of having all their evidence available means that they cannot be penalised in costs for their past behaviour relating to the substantive subject matter of the Tribunal's inquiries. "

11. The Tribunal did not and could not have addressed the question of the applicant's co-operation or non-cooperation in its final Report which was a report of its findings of fact and which did not involve it in questions of co-operation, and the Tribunal is required to make a separate adjudication on the issue at the second stage of its process. It is however clear that the statutory considerations require and empower the Tribunal to have regard to the conduct of persons before it for the purposes of the costs decision. One statutory basis to which the Tribunal must, by legislation, have regard is a failure to co-operate with or provide assistance to or knowingly giving false or misleading information to the Tribunal. The Tribunal retains a discretion where there are "sufficient reasons rendering it equitable to do so" to award costs, but it is constrained by statute to have regard to the failure to co-operate of a person or the giving of false or misleading information by that person. The law is clear and does not confine the consideration to false evidence, and the Tribunal may not refuse the whole or part of an applicant's costs merely on account of the fact that the applicant has given false evidence or information to the Tribunal. The Tribunal must address itself to the question of whether the false or misleading evidence was given knowing it to be false or misleading. The Tribunal accordingly must take a view as to the truth of the evidence and as to the intention or knowledge of the person giving that evidence.

Sequence of events

12. The Tribunal published its final Report on 22nd March, 2012. Thereafter, it invited written submissions in the context of a proposed finding of non-cooperation and two sets of written submissions were furnished by the solicitors for Mr. Fox. The Tribunal deferred making its decision until after certain criminal matters had been dealt with, and by letter of 31st October, 2013, confirmed its finding of non-cooperation proposed in its letter of 18th January, 2012, saying that those proposed findings would now constitute actual findings of non-cooperation.

13. The Tribunal identified that the basis of its decision was the review of the evidence given by Mr. Fox as part of the identified modules, and emphatic and repeated denials by Mr. Fox that he had sought money from or received money from Mr. Dunlop. It noted that these denials were made in circumstances where Mr Fox's evidence was based on his own personal knowledge and recollection and the absence of any claimed lack of recollection because of the passage of time. The Tribunal then identified its findings as follows:

"In all these circumstances, the Tribunal is satisfied that, as a matter of probability, and on the basis of logic, that these denials were made by Mr. Fox in the knowledge on his part that such were false and misleading. "

The jurisdiction of the Tribunal

14. Following the dicta of McCarthy J. in *Goodman v. Hamilton*, approved by the Supreme Court in *Murphy v. Flood*, the Tribunal may not make its decision based on its substantive findings. If it can be shown that the finding of knowing untruth against Mr. Fox was based on its findings of fact that he received corrupt payments and that his denials of such receipt were false, the Tribunal will have erred in the way identified by Hardiman J. in *Murphy v. Flood* and McCarthy J. in *Goodman v. Hamilton*. The Tribunal's findings which support its decision on non-cooperation must be based on findings that it comes to as to the conduct of a person and not on its primary findings.

The status of Mr. Fox

15. Mr. Fox was not a mere witness before this Tribunal. In this regard he differed in a significant way from Mr Chawke, and his evidence was fully challenged in the course of a number of hearings and the considerations that led me to the conclusions in *Chawke v Judge Alan Mahon & Ors* do not arise. He was identified as a person who had or might have received monies for his vote in the rezoning of lands. He denied the allegations of Mr. Dunlop that he had received payments, and denied the allegations of corruption in the planning process. Mr. Fox knew that his own behaviour and his personal account of the matters identified by Mr. Dunlop, were an important part of the investigation of the Tribunal in the modules in which he was involved. He could have had no doubt but that the Tribunal was charged with making a determination, *inter alia*, whether he personally had received payments, and that those payments were corrupt. He was not in any sense a mere witness in the sense that Mr. Chawke was. He was a witness whose evidence was central to the matters to be determined, and he was afforded every opportunity to put his version of events and to comment on the versions proffered by others.

16. His evidence was rejected and he made no challenge to the findings of the Tribunal.

The process of analysis carried out by the Tribunal

17. The Tribunal made a number of express findings in its final Report in regard to Mr. Fox. These briefly are as follows:-

- (a) It found that his emphatic and absolute denials of the evidence of Mr. Dunlop were falsely given.
- (b) It found that he was motivated in the giving of this evidence by a desire to frustrate or hinder the Tribunal in its inquiries.
- (c) It found as a result that the applicant had not co-operated with the Tribunal in the manner envisaged by the statutory provisions.

18. The Tribunal in assessing the conduct of a witness for the purpose of its deliberation must fairly assess his conduct before the Tribunal, and to the degree of pre and post hearing engagement had with a person. It must confine itself to that conduct and not to its substantive finding that Mr. Fox did receive corrupt payments. As Denham J. stated in *Murphy v. Flood* at para. 81 :-

"Fundamentally the issue is whether a party has cooperated with a tribunal so as to be entitled to his or her costs. A person found to be corrupt who fell on his sword and fully cooperated with a tribunal would be entitled to assume, unless there were other relevant factors, that he would obtain his costs. This is to facilitate the running of a tribunal. "

19. Mr. Fox did not fall on his sword. He continued, despite being pressed and tested, to emphatically and absolutely deny the receipt of corrupt payments. It was the emphatic and absolute nature of his evidence that gave rise primarily to the Tribunal's finding that Mr. Fox knew his evidence to be untrue. The Tribunal took a view as to his motivation and determined that it was satisfied as a matter of probability and on the basis of logic that the denials were made by Mr. Fox in the knowledge on his part that they were false and misleading.

Discussion and conclusion

20. The core question for me is whether the Tribunal fell into error in relying on the substantive findings in coming to this conclusion. Fennelly J. in *Murphy v. Flood* said that the presumption would be in favour of the reimbursement of costs to persons who co-operated with an enquiry, as otherwise the obligation to co-operate with Tribunals would impose loss without compensation. He did, however, (at para. 359) point to the dicta of Geoghegan J. in *Haughey v. Moriarty* [1999] 3 I.R. 1 (at p.14) that non-cooperation "of course would include the adducing of deliberately false evidence". That dicta reflects logic and good sense, and accords with the statutory position that untrue evidence given as a result of frailty of memory, or the position of a witness who retracts and "falls on his sword" may still lead to an award of costs, such award being justifiable in the greater common good.

21. In *Murphy v. Flood*, the Tribunal had fallen into error in rejecting the plaintiff's costs application by virtue of the "serious findings of corruption in its substantive report" and as the Supreme Court found that it was not possible to sever these findings from other findings the decision was flawed in its entirety. As Hardiman J. said, at para. 222, the order refusing costs must fall since:-

"Apart from anything else it is plainly based in part on the substantive findings of the Tribunal. It is not possible to sever this order because the Tribunal itself has not made it clear to what portion of the costs the findings on the substantive issues refer. "

22. This Tribunal in its final Report did make it possible to sever its substantive findings from those that made an actual finding that Mr. Fox had failed to co-operate. It made certain findings with regard to the credibility of his evidence and that of other witnesses, and fully explained its analysis and the elements that led to this conclusion. My view is that the approach of the Tribunal was quite different from that in *Murphy v. Flood* and the Tribunal did make it clear that it came to its conclusion not based on its the substantive finding of corruption but on its actual finding that Mr. Fox had not been truthful and the reasons it came to that conclusion. The Tribunal had weighed the evidence, balanced different versions of events and the responses of Mr Fox to these different versions, and adjudicated on the weight and credibility of other contrary witnesses. It held following a well reasoned analysis that Mr Fox's evidence was in parts "incredible" and "unlikely".

23. One might rationally ask what elements of a hearing could lead a Tribunal to a finding of knowing untruth if the elements did not include, or possibly even substantially be composed of, the findings and analysis with regard to the credibility of witnesses. Indeed, the dicta of Geoghegan J. in *Haughey v. Moriarty* clearly suggests that lack of co operation could include the adducing of deliberately false evidence. The Tribunal did not, in my view, make the finding of non-cooperation based in any way on the finding that Mr. Fox had been in receipt of corrupt payments, but on its finding as to the veracity of the evidence and the balance of that evidence against other evidence adduced to it. The substantive finding of the Tribunal was that Mr Fox received corrupt payments. The decision challenged before me was not based on findings on the substantive matter of the Tribunal but on findings of conduct, intention or the reason why evidence was given.

24. For that reason it seems to me the Tribunal did not fall into error and while it did come to its conclusion on non-cooperation from certain findings of credibility contained in the substantive Report, its conclusion was not based on its substantive findings on the subject matter of the Tribunal, the corrupt payments found to have been received by Mr Fox, but its actual and analysed findings that Mr. Fox's evidence was to be disbelieved.

25. In the circumstances, I hold that the applicant is not entitled to the order sought.