Neutral Citation [2013] IEHC 171

THE HIGH COURT

JUDICIAL REVIEW

RECORD NUMBER 2011/605JR

BETWEEN

OLIVER BARRY

APPLICANT

AND

MR JUSTICE FEARGUS FLOOD (THE FORMER SOLE MEMBER OF THE TRIBUNAL OF INQUIRY INTO CERTAIN PLANNING MATTERS AND PAYMENTS), HIS HONOUR JUDGE ALAN MAHON, HER HONOUR JUDGE MARY FAHERTY AND HIS HONOUR JUDGE GERALD KEYS (THE MEMBERS OF THE TRIBUNAL OF INQUIRY INTO CERTAIN PLANNING MATTERS AND PAYMENTS), IRELAND AND THE ATTORNEY GENERAL

RESPONDENT

Judgment of Ms. Justice Iseult O'Malley delivered the 12th of April, 2013

Introduction

1. The applicant is a business man who in the late 1980s/early 1990s was involved in the establishment and promotion of Century Radio. Century was a short-lived radio station, intended to be a fully-licensed competitor to RTE radio. It collapsed in 1991.

2. The relationship between Century and the then Minister for Communications, Mr. Ray Burke, and in particular a payment of iR £35,000 by the applicant to Mr. Burke in May, 1989, became one of the matters investigated by the Tribunal of Inquiry into Certain Planning Matters and Payments (whose Sole Member at the time was the first named respondent). In its Second Interim Report, published on the 26th September, 2002, the Tribunal found that this was a corrupt payment, solicited by Mr. Burke and paid to him as a bribe to act in Century's interests when performing his public duties as a Minister. The Report records that the Tribunal was satisfied that the applicant had hindered and obstructed the Tribunal by, in essence, failing to provide a truthful account in relation to the circumstances of the payment.

3. In September, 2004, the applicant submitted an application to the Tribunal, in the person of the second named respondent, ("the Chairman") for his costs. In October, 2004 the Chairman refused that application. The ruling was made largely on the basis that the applicant had been found to have obstructed and hindered the Tribunal. The applicant took no challenge to either the findings of the Tribunal or the ruling on costs at that time.

4. On the 21st April, 2010 the Supreme Court delivered its decision in the case of *Murphy v Flood* [2010] 3 IR 136 (*Murphy*). The applicant in those proceedings was also a person against whom the Tribunal had made findings of obstruction and hindrance by failing to give a truthful account of certain matters to the Tribunal, and who had in like manner been refused his costs. The Supreme Court held, in summary, that since obstruction and hindrance were criminal offences the Tribunal had no power to make such a finding and had further erred in relying on the finding in its decision on the costs application.

5. The applicant herein then initiated correspondence requesting the Chairman to review/vacate the costs ruling in his own case. Ultimately, by letter dated the ih March, 2011, the Chairman declined to so do. The applicant now challenges that decision and also the ruling made in 2004.

The Tribunal and the 2nd Interim Report

6. On the 4th November, 1997 the Tribunal to Inquire into Certain Planning Matters and Payments was established by Ministerial Order. On foot of a later extension of its terms of reference, the Tribunal inquired into a number of allegations relating to the activities of Mr. Ray Burke. These and other, unrelated, matters within the terms of reference are dealt with in the Second Interim Report of the Tribunal, published on the 26th September, 2002. As set out in the report, the Tribunal found that in 1989, the applicant made a corrupt payment of £35,000 to Mr. Burke for the purposes of ensuring that Mr. Burke acted to serve the interests of Century Radio in his capacity as Minister for Communications. The applicant had at all times maintained that this payment was an ordinary political contribution.

7. Separately, under the heading "Co-operation with the Tribunal", the Report stated at paragraph 11, page 143:

> *"The Tribunal is satisfied that Mr Oliver Barry obstructed and hindered the Tribunal by:*
>
> *(a) Failing to provide a truthful account as to why he had paid Mr Burke £35,000 in May 1989.*
>
> *(b) Failing to provide the Tribunal with a truthful account of the role played by him and Mr Stafford in ensuring that Mr Burke issued a Directive in March 1989 to RTE concerning transmission charges.*
>
> *(c) Failing to give a truthful account of the role played by him and by Mr Stafford in ensuring that Mr Burke would introduce legislation to cap RTE 's advertising income, to redistribute RTE 's licence fee income and to change the role of 2FM*
>
> *(d) Failing to provide a truthful account of the reimbursement to him of the £35,000 aid to Mr. Burke in May 1989.*
>
> *(e) Failing to comply with the Tribunal's Order for Discovery within the time limited for so doing or within a reasonable time thereafter. "*

8. By virtue of s. 1(2) of the Tribunals of Inquiry (Evidence) Act, 1921, as amended by s. 3 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979 it is an offence to obstruct or hinder a tribunal.

9. On 21st September, 2004 the applicant made an application to the Tribunal for costs in the sum of €611,000. By that date Mr. Justice Flood had retired and had been replaced by the three judges named as the second, third and fourth respondents. Issues relating to the costs of modules dealt with by him were therefore referred to the new Chairman of the Tribunal, His Honour Judge Mahon (the second named respondent). In a decision of the 15th October, 2004, the Chairman refused the applicant costs on the basis of the findings of the Second Interim Report that Mr. Barry had "obstructed and hindered" the Tribunal.

10. In his ruling the Chairman analysed the findings in the Report as follows:

> *"The non-cooperation findings against Mr. Barry are extensive, significant and serious. Although Mr. Barry allegedly admitted the payment of £35,000 to Mr. Burke, and while more often than not, the Tribunal preferred Mr. Barry's account of the matters to that of Mr. Burke, the Tribunal found Mr. Barry not to have given truthful evidence. Most importantly, the Tribunal rejected Mr. Barry's contention to the most crucial issue, namely the reasons for the payment of £35,000 to Mr. Burke. Mr. Barry contended that this payment was a legitimate political donation, but the Tribunal found that the payment was a bribe and it was intended to ensure that Mr. Burke would in his capacity as Minister for Communications assist the private interests of Mr. Barry and his fellow promoters.*
>
> *It was open to Mr. Barry to provide the Tribunal with a truthful and accurate account of the true reasons for the payment. Had he done so, the Tribunal while concluding the payment to be a bribe, would, I believe, have exonerated him on the issue of cooperation. This in turn would place me in a position where I could seriously consider allowing him, at least, a substantial portion of his costs.*
>
> *I have considered correspondence between Mr. Barry's solicitors and the Tribunal, and the transcripts of evidence to ascertain if there were significant instances of cooperation on key issues arising in the Century Radio module such as would entitle Mr. Barry to some of his costs. Unfortunately such instances as there were do not take from the fact that Mr. Barry's non cooperation with the Tribunal was a major feature of his evidence and over shadowed almost all of his evidence and the provision of information to the Tribunal. Mr. Barry's evidence and the information furnished by him to the Tribunal were clearly designed to mislead the Tribunal. In the circumstances I do not believe it appropriate that Mr. Barry be paid his costs. "*

11. The applicant had not been put on notice that the costs ruling would be dealt with on the basis of the findings of obstruction and hindrance.

The jurisdiction of the Tribunal in relation to costs
12. Section 6(1) of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979 as amended by s.3 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1997 provides:

> *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 tribnal, 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.*

13. The Terms of Reference of the Tribunal included the following provision:

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

Applicant's Delay from October, 2004
14. It is accepted by the applicant that he took no legal steps after the costs ruling until 2010. The two main reasons given are that he was in weak financial circumstances, due largely to his engagement with the Tribunal, and that he was advised by his lawyers that he did not have a strong case.

15. The applicant says that prior to his appearance at the Tribunal he was engaged in the discovery process, having to comply with several different orders. He acknowledges delay on his part in complying with some of the discovery orders but says that this was due to the extensive nature of those orders and that he did ultimately comply with all of them.

16. The applicant deposes that he was told by counsel for the Tribunal at a private session in mid-July 2000 that he would be called to give evidence very shortly thereafter. He exhibits part of a transcript of an exchange between himself and counsel to confirm this. He therefore engaged his legal team to attend at the Tribunal on a daily basis at a cost, he says, of €8,000 per day. In fact, the schedule of witnesses did not work out as planned. On the 30th October, 2000 he wrote to the first respondent stating that he had already incurred legal costs of €220,000; that he could not sustain the financial burden and asking for "guidance" on the matter. There is no reference in the papers before the Court to any reply to this letter but the respondents do say that they made every effort to keep the applicant informed and up-dated as to the witness schedule.

17. The applicant spent fourteen days giving evidence, finishing in February 2001. He says that he incurred, in total, legal bills in the sum of €611,000. He has given a certain amount of detail as to his means at the time and has exhibited documentation to support his averment that he had to extend his overdraft significantly to meet his obligations. However for some reason he has not exhibited either the bills or proof of payment.

18. Evidence has also been given, in the form of letters from his accountant, as to the applicant's income in the years 2000- 2005.

19. After the ruling on costs, the applicant consulted with his lawyers and instructed them that he wished to challenge it. A plenary summons was drafted but was not issued, the view being taken that in fact judicial review would be more appropriate. However, at that stage, the applicant says, he was advised that his case was not strong and that he would probably lose. He was further informed that to take judicial review proceedings would cost €20,000 for the leave application and €100,000 for a full hearing, not including the costs payable if he lost. He avers that he did not believe at the time that he would be able to procure legal representation on a contingency basis. He does not set out the basis for this belief and does not suggest that he explored the possibility. He does say that he has managed to make such an arrangement for the purpose of the present application.

20. From the papers it is clear that the applicant was represented by different lawyers at different times. It is not clear who told him that he did not have a "strong case" or who gave him the fee estimate, or whether this advice came from solicitor or counsel. Although the making of these averments has clearly involved at least a partial waiver of legal privilege the applicant has not exhibited the contents of any such advices, whether by way of written opinion, consultation notes or an affidavit from his solicitor.

21. A further consideration, the applicant says, was the possibility of ongoing adverse media attention. Having talked it over with his family, he decided not to proceed with litigation.

22. An important feature of this aspect of the case is that the Senior Counsel who signed the draft plenary summons was also leading counsel in the *Murphy* case. The fact that the applicant was aware of the *Murphy* proceedings is relied on by both sides - the applicant maintains that he was entitled to await the outcome while the respondents point to it as indicating that he had decided not to even issue a plenary summons in his own right.

The Supreme Court decision in *Murphy v Flood*

23. On the 21st April 2010, the Supreme Court gave its decision in *Murphy v Flood and Ors* [2010] 3 IR 136. The plaintiffs in that case had appeared before the Tribunal in relation to matters unconnected to the applicant herein. They had, like this applicant, been found to have obstructed and hindered the Tribunal by giving false accounts in relation to various matters and were refused their costs on a similar basis. The wording used by the respondents in coming to these conclusions is for practical purposes identical to that in the case of the applicant.

24. The findings of concern to the *Murphy* plaintiffs were contained in the 2nd and 3rd Interim Reports, published respectively on the 26th September, 2002 and the 24th January, 2004. Plenary proceedings challenging the findings were issued on the 20th April, 2004. The Chairman refused the application for costs on the 9th November, 2004 and the application for judicial review in respect of that ruling, having been moved on the 2nd January, 2005, was absorbed into the plenary proceedings. The only issue of delay related to the 2nd Interim Report but in the factual circumstances of the case there was no real difficulty in extending the time for that aspect.

25. The Court held that the Tribunal had acted *ultra vires* in (i) making a finding of obstruction and hindrance, given that that was a criminal offence in respect of which the Tribunal had no jurisdiction and (ii) basing the costs refusal decision on that finding and on the substantive findings of the Second Interim Report. It was also observed, although this seems *obiter*, that the Tribunal had breached fair procedures in that it had not given the applicants notice that it intended to approach the question of costs on the basis of those findings.

26. After the delivery of this judgment the applicant wrote personally to the respondents on the 22nd July, 2010 in the following terms:

> *"I was a witness at the Planning Tribunal in the module on Century Radio. I was refused my costs on the grounds that the Tribunal found that I had obstructed and hindered the Tribunal, which incidentally, I deny.*
>
> *In light of the Supreme Court judgement in the case of Murphy & Others v Flood & Others, I wish to apply for a hearing by the Tribunal to review the refusal to grant me my costs and would appreciate, at your earliest convenience, an indication when that review hearing would take place.*
>
> *I would also appreciate if you could let me have a copy of the order refusing me costs."*

27. The Tribunal replied by letter of the same date as follows:

> *"I refer to ...your letter dated the 22nd July 2010.*
>
> *As you are aware, the Tribunal's Order in relation to the issue raised in your correspondence was made on the 15th day of October, 2004. It was of course open to you, or lawyers on your behalf, to challenge the validity of that Order up to six months following on from that date. As no proceedings issued against the Tribunal challenging the findings in the Order dated the 15th day of October 2004, the Tribunal Chairman is of the view that you are now out of time to challenge this Order.*
>
> *Accordingly, the Tribunal Chairman is satisfied that his Order refusing your costs is valid and is of the belief that he is not required to reconsider same. "*

28. There followed correspondence between the applicant's solicitors and the Tribunal. The Chairman maintained his position that the applicant was out of time to challenge the ruling and that it was therefore valid and did not require to be reconsidered, but invited the applicant's solicitors to make written submissions in respect of the matter. Submissions were duly forwarded on the 29th October, 2010.

29. On the 7th March, 2011 the Chairman gave his considered response, again deciding that he would not review his order of the 15th April, 2004. His grounds were set out as follows in full:

> *1. The Supreme Court decisions in the case of De Roiste v The Minister for Defence (2001), BTF v The DPP [2005] 2 IR 559 and O'Brien v Moriarty (1) (2005) were considered These decisions provide authority to a Court to dismiss proceedings where the party instituting them has been guilty of inordinate and inexcusable delay in commencing litigation.*
>
> *2. The obiter dictum of Kearns J in O'Brien v Moriarty in the context of the general jurisdiction of a Tribunal under the*

Tribunal of Inquiries (Evidence) (Amendment) Act suggest that any challenge to the powers or decisions of the Tribunal should be made on notice to the Tribunal, at the very earliest opportunity after the cause of complaint arises.

3. Legal proceedings challenging the Order of the Chairman dated 15th April 2004 were never issued on behalf of Mr. Barry. A Plenary Summons, similar to that which was served in the Joseph Murphy & Ors case could have been issued and/or served on the Tribunal with minimal cost implications for Mr. Barry. It would have then been open to Mr. Barry in any such plenary proceedings to request the pleadings abide the outcome of the Joseph Murphy & Ors v Fergus Flood & Ors challenge.

4. The period of delay is almost six years, running from 24th October 2004 until the letter written in person by Mr. Barry to the Tribunal on 22nd July 2010. The first letter from your firm is dated 25th August 2010.

5. Judicial Review proceedings were not instituted, and your client has failed in his obligation to apply promptly and, in any event, within six months where certiorari is sought, or within three months where declaratory relief is sought. The obiter dictum of Kearns J in 0'Brien v Moriarty (1) (2005), in the context of the general jurisdiction of a Tribunal under the Tribunals of Inquiry (Evidence) Acts suggests that any challenge to the powers or decisions of the Tribunal should be made on notice to the Tribunal at the very earliest opportunity after the cause for complaint arises.

The failure on the part of Mr. Barry to institute proceedings challenging the decision of the Chairman of the Tribunal in relation to his Order of 151h April 2004 is consistent with what Hardiman J described in his concurring Judgment in A v Governor of Arbour Hill Prison as in effect seeking to "piggyback" on a possible successful outcome of those proceedings.

6. The Tribunal Chairman notes that your client's submission seeks to distinguish the ratio decidendi of the Supreme Court Judgment in A v Governor of Arbour Hill Prison as not applying to what is characterised as the retrospective application of an administrative decision as distinct form the retrospective application of a decision declaring a section of a statute repugnant to the Constitution. The Tribunal Chairman is of the view that rather than dealing with the retrospective application of an administrative decision, Joseph Murphy & Ors v Feargus Flood & Ors is a classic instance of a change of law case. It has determined the vires of the Tribunal with regard to a finding of hindering and obstruction under the Tribunals of Inquiry (Evidence) Acts 1921-2004. In addition to the manner in which the Tribunal's powers are to be interpreted under the above mentioned acts has been clarified in a manner not addressed by the Supreme Court in the cases of Goodman v Mr Justice Hamilton (No 1) or in [the case of] Haughey v Moriarty (No 1).

Reliefs Sought

30. Leave to seek judicial review was granted on the 18th July, 2011. The applicant seeks the following reliefs:

(i) An Order of *certiorari* quashing the decision of the Respondent made on 7th March 2011, whereby the Respondent declined to vacate the Order made by the Respondent on 15th April 2004, refusing the applicant costs, and grant him costs.

(ii) If the Court grants an order for *certiorari* as set out in (i) the applicant seeks a Declaration that findings made by the Respondent in regards the applicant in the Second Interim Report of 261h September 2002 were made *ultra vires*, in breach of fair procedures and in breach of Articles 34.1, 37 and 38.1 of the Constitution of Ireland.

(iii) If the Court grants an order for *certiorari* as set out in (i) the applicant seeks a Declaration that the decision of the Respondent refusing the applicant costs, dated 15th October 2004, was made *ultra vires* and in breach of fair procedures.

(iv) If the Court grants an order for *certiorari* as set out in (i) the applicant seeks a Declaration that section 6 (1) of the Tribunals of Inquiry (Evidence) Amendment Act 1979, as amended by section 3 of the Tribunals of Enquiry (Evidence) Amendment Act 1997 is unconstitutional.

(v) If the Court grants an order for certiorari as set out in (i) the applicant seeks a Declaration that the applicant is entitled to costs as claimed.

(vi) Damages including damages for breach of the applicant's Constitutional rights and fair procedure.

(vii) If necessary, an extension of time to bring within proceedings.

30. It has been made clear that the applicant, although he does not personally accept the Tribunal findings of corruption and bribery in relation to the payment to Mr. Burke, does not now seek to challenge them. Insofar as the relief sought at paragraph (ii) above appears to contradict this it can be ignored. The relief sought in paragraph (iv) is not being pursued and the State parties were not represented in this hearing. The issue in these proceedings concerns the entitlement, if any, of the applicant to his costs of appearing before the Tribunal. The third and fourth named respondents are also members of the Tribunal since the retirement of Mr. Justice Flood but played no part in the matters giving rise to the proceedings.

31. By Notice of Motion dated the 29th July, 2011 the respondents sought to set aside the grant of leave on the basis that there had been an alleged failure to make full disclosure at the *ex parte* application for leave; that the proceedings were out of time and/or were an abuse of process and/or were frivolous and vexatious.

32. This application was refused by the High Court (Hedigan J) on the 22nd May, 2012. I regard the issue of non-disclosure as having been fully disposed of in that judgment. In relation to the other arguments raised by the respondents, Hedigan J held, in summary, that they had not met the threshold required for the purpose of setting aside leave.

Submissions

33. The applicant says that his case is on all fours with that of the applicants in *Murphy v Flood* and that he is therefore entitled to the same reliefs. The first respondent acted *ultra vires* in making a finding of obstruction and hindrance against him and breached his rights to fair procedures and natural and constitutional justice in the same manner. He says that the Chairman then further acted *ultra vires* in his costs decision 15th October, 2004 in taking the substantive corruption finding and the obstruction and hindrance findings into account.

34. It is argued that the decision of the 7th March, 2011 was a fresh decision, different in nature to that of 15th October, 2004. In making it the respondent breached fair procedures, erred in law and breached Constitutional rights in failing to have proper regard to a Supreme Court decision holding that it had acted *ultra vires*.

35. The applicant argues that if there has been delay on his part it was principally due to his impecuniosity at the time of the costs decision. This, in turn, he seeks to lay at the door of the Tribunal because of the inaccurate predictions as to its scheduling, the resulting necessity for the attendance of his legal team over a lengthy period and the wrongful refusal to give him his costs.

36. He further claims that he was legally advised at the time that he did not have a strong case to challenge the ruling. However, it is argued, the fact that, as a result of the Supreme Court decision, he now has a strong case is something that the Court should take into account.

37. The respondents' arguments are largely encapsulated in the letter of the 7th March, 2011, set out above. It is further contended that the matter is now to be seen as a past legal proceeding, or a closed transaction or process of the sort described by Hardiman J in *A v The Governor of Arbour Hill Prison* [2006] 4 IR 88. At the hearing, in response to a query from the Court, the respondent submitted that one implication of this was that the Chairman himself did not have jurisdiction to reconsider the ruling.

38. It seems to me that two separate issues arise for determination. The first is whether it is now possible for the applicant to challenge the 2004 ruling, directly, or, as he seeks to do in these proceedings, indirectly. That, in turn, involves a consideration of the law in relation to delay and the question whether the applicant has disentitled himself from seeking relief.

39. The second issue is whether it is open to the applicant to challenge the 2011 decision not to reconsider the 2004 ruling.

Delay

40. Order 84 of the Rules of the Superior Courts, as it stood at the relevant time, required an applicant to seek leave for judicial review proceedings within three months, or six months where the relief sought was *certiorari* "unless the Court considers that there is good reason for extending the period within which the application shall be made". In any event an applicant must act promptly. These time limits are, clearly, very much shorter than is the case in most other types of litigation. There are a number of reasons for this, among them being the need to ensure that proceedings as to the legality of actions by public bodies should be dealt with expeditiously and - on the other side of the coin - to ensure the provision of a swift means of redress for persons suffering as a result of wrongful actions.

41. In *De Roiste v Minister for Defence* [2001] 1 IR 190 (*De Roiste*) the Supreme Court analysed the factors to be considered in an application for an extension of time. It is clear that an applicant who has delayed in instituting proceedings bears the burden of showing why time should be extended in his favour. *Per* Denham J at p. 203:-

> *" ...the court has discretion to extend time if the court considers there is good reason. The onus is on the applicant to meet the conditions. It is for the applicant to show that he has made the application promptly and within the time limit or that there is good reason to extend the time within which the application may be made. The conditions are not rigid as judicial review is a discretionary remedy. There remains in the court an inherent discretion to be exercised according to the requirements of justice in the circumstances of each case.*

42. Where the circumstances of the delay give rise to a finding that the applicant has deliberately acquiesced in the allegedly wrongful act and has relinquished an opportunity to challenge it he or she may in some cases be found to have disentitled himself or herself from relief. In the same case Fennelly J. said at p. 221:-

> *"In my view, extremely long delay, without cogent explanation and justification may in itself constitute a ground for refusing relief The respondent does not have to establish that he has been prejudiced though prejudice will usually be relevant. So also will the effect on third parties as in The State (Cussen) v. Brennan [1981} I R. 181. It is, of course, conceivable that in exceptional circumstances even very long delay might be explained and even justified. The respondent might, for example, be responsible for concealment or for exercising control over relevant information or even the applicant's own freedom of action. "*

45. An applicant who has delayed may find himself or herself debarred from relying on a decision made in the case of a third party in the intervening period. A clear example of this was the case of *A v Governor of Arbour Hill Prison* [2006] 4 IR 88 (*A*). Having considered the cases of *Murphy v The Attorney General* [1982] IR 241 and *State (Byrne) v Frawley* [1978] IR 326 Hardiman J. said at p. 184:-

> *"The cases cited above all relate to attempts by a third party to piggy back on a declaration of invalidity or inconsistency obtained by another person; in more formal language, to assert a right to a benefit based on a declaration obtained by another and (in this case) on the basis of a ius tertii which is unavailable to the applicant. In each case, these attempts were unsuccessful on the basis of something in the nature of preclusion arising on the individual facts of the cases ... "*

46. Among the factors he listed as disentitling an applicant from relief are "preclusion, estoppel, acquiescence, delay, public policy, equity, impracticality and the impermissibility of a *volte face* by a litigant, all of which (perhaps with more) might also be described as abuse of process.

47. Both *A* and *De Roiste* are authority for the proposition that the balance of justice and the strength of the applicant's case are both factors in the exercise of the court's discretion. As Keane CJ said in *De Roiste* at p.196:-

> *"The courts have an inherent jurisdiction to dismiss proceedings where the party instituting them has been guilty of inordinate and inexcusable delay. However, even where the delay is both inordinate and inexcusable, the court must decide whether, having regard to the facts of the particular case, the balance of justice is in favour of, or against, its being permitted to proceed. "*

Denham J at p.199 referred to the oft-cited principles in *Rainsford v Corporation of Limerick* [1995] 2 ILRM 561:-

> *"Even where the delay has been both inordinate and inexcusable, the court may allow the proceedings to continue if on the facts it finds that the balance of justice is in favour of this course. "*

Conclusions in relation to the 2004 Ruling
48. The applicant is manifestly in breach of the time limits set by Order 84 and I am satisfied that, by reference to any normal standards of judicial review litigation, the delay is inordinate. I am further of the view that the delay has not been sufficiently explained or justified by the applicant.

49. The argument that the applicant was rendered impecunious by the Tribunal process suggests that the Tribunal in some sense perpetrated a legal wrong against him by not being able to predict its schedule accurately and by taking as long as it did in relation to his evidence. That seems to me to be unsustainable. The Tribunal was carrying out its duty under the terms of reference, which included an inquiry into the payment admitted to have been made by the applicant. The Tribunal found that payment to have been corrupt and that finding, whether accepted by the applicant or not, has never been challenged.

50. The reasoning behind the refusal of costs, on the other hand, was certainly capable of challenge. The applicant says that he could not fund it at the time, was advised his case was weak and did not wish to incur further adverse publicity.

51. The first two reasons would in my view require rather more solid evidence than has been produced. The evidence as to his means does not deal with his situation between 2005 and 2010.

52. If the decision is to be laid at the door of his legal advisors one might have thought that proper evidence should be given as to the full contents of those advices. In any event, lack of awareness on the part of the applicant that, as a matter of law, a claim would have had a successful outcome could not prevent time from running.

53. The possibility of adverse publicity, while no doubt a real concern to the applicant, is not a factor that can be given much weight in an application of this sort.

54. The main consideration in favour of the applicant is that his case is now undoubtedly strong, perhaps unanswerable. One can add to this the fact that this is not a case where the respondents or any third party have acted to their detriment or been prejudiced by the delay.

55. It seems to me that the evidence points to the conclusion that the applicant, having been put off by the potential expense of litigation, the uncertainty of a successful outcome and the possibility of further publicity, decided to cut his losses at that point. To come to court now, after the Supreme Court has determined the issue in *Murphy*, is an example of the behaviour described by Hardiman J in A as "piggybacking" (although not, in this instance, falling foul of the *ius tertii* rule). To hold that the matters outlined above could constitute

"good reason" for the delay that has occurred would be to abolish time limits for any person who decides not to take the risk of litigation on his own behalf but mentally reserves the right to take an action when he sees someone else succeed on the same issue.

56. I therefore conclude that the applicant is guilty of inordinate and inexcusable delay in relation to this aspect of the case.

57. The next issue to be determined is whether the balance of justice nonetheless requires that the applicant's claim for relief should be decided on the merits. In the factual circumstances of this case, I find that it does not by reason of the same factors considered in relation to the general question of delay. Where a person of full age, with the benefit of legal advice, makes a considered decision not to litigate a particular claim in an area of law where promptness is of such importance, the circumstances of the legal wrong alleged to have been done would need to be compelling indeed to allow him or her to initiate proceedings after such a lapse of time. The reality here is that the plaintiff made a choice at the time and I see no injustice in holding him to that choice now. I will therefore refuse the reliefs sought in respect of the Tribunal's original ruling.

The 2011 ruling
58. The request by the applicant to the Tribunal after the *Murphy* judgment was to reconsider its ruling on the application for costs in the light of the Supreme Court decision.

59. I have already set out in full the response of the Tribunal. Examining that letter closely, it is clear that paragraphs 1 - 5 are really addressed to the jurisdiction of the court to grant relief in view of the applicant's delay, rather than to the question whether the Tribunal could or should revisit its ruling. I have agreed with the content of those paragraphs in so far as I have held that the applicant should not be permitted to seek to quash the 2004 ruling at this stage. However, they do not in themselves give adequate reasons as to why the Tribunal itself cannot or should not re-examine a decision, affecting the rights of an individual, which was clearly made on an unlawful basis. In relation to this aspect, paragraph 6 and the submission made at the hearing that the Tribunal's decision was a closed or past transaction that could not be re-opened are the relevant arguments.

"Change of law" argument
60. The Chairman expressed the view that what had happened in the *Murphy* case was a clarification of the *vires* of the Tribunal, ruling on an aspect that had not previously been considered.

61. He relies on the Supreme Court decision in *A. v The Governor of Arbour Hill Prison* and in particular the passage from the judgment of Murray CJ at p. 117:

> *"Judicial decisions which set a precedent in law do have retrospective effect. First of all the case which decides the point applies it retrospectively in the case being decided because obviously the wrong being remedied occurred before the case was brought. A decision in principle applies retrospectively to all persons who, prior to the decision, suffered the same or similar wrong, whether as a result of the application of an invalid statute or otherwise, provided of course they are entitled to bring proceedings seeking the remedy in accordance with the ordinary rules of law, such as a statute of/imitations.*
>
> *It will also apply to cases pending before the Courts. That is to say that a judicial decision may be relied upon in matters not yet finally determined. But the retrospective effect of a judicial decision is excluded from cases already finally determined. This is the common law position. "*

62. This passage was adopted by the Supreme Court of the United Kingdom in *Cadder v HM Advocate* [2010] UKSC 43, in giving guidance as to how its ruling in that case was to be applied to other cases where the same circumstances arose.

63. The respondent accepts, obviously, that the Tribunal is not a court but argues that the Report of the Tribunal, published in 2002,

and the costs ruling of the Chairman, in October 2004, may be regarded as a "past or closed legal dealing, process or transaction", quoting Hardiman J at p. 184 in *A*.

The 2011 ruling

64. I do not think that the term "change of law" is appropriate to describe the impact of the Supreme Court decision in *Murphy v Flood*. There was no previous authority or settled view of the law giving sanction to the approach adopted by the Tribunal whereby it made findings of criminal actions (obstruction and hindrance) against individuals on the basis that it did not believe their evidence in relation to substantive matters. By the same token, there was no authority for the proposition that such a finding could ground a refusal of costs. If anything, such authority as existed was, in my view, against this approach - in particular, the judgment of McCarthy J in *Goodman v Hamilton* [1992] 2 IR 542, at 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. "*

65. The Tribunal's view of its powers was, therefore, something that was always open to correction in the High or Supreme Court.

66. The argument that the ruling is a "past or closed legal dealing" depends, to my mind, too much on an analogy between the Tribunal and a court. Such analogies must be examined with great caution. A Tribunal set up under the Tribunals of Inquiry Act is not, notoriously, administering justice. It is not engaged in a process of determining rights and liabilities in the manner of a court in *inter partes* litigation. It may permit persons called before it to be legally represented and, where representation is granted, will consider applications for costs.

67. There is no cause of action to be determined and no "event" for costs to follow the normal standard by which costs decision are made. Instead, detailed criteria, coupled with a discretion in the application of the criteria, for rulings in relation to costs are set out ins. 6(1) of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979 as amended by s.3 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1997.

68. A further crucial distinction is that a Tribunal order for costs, unlike a court order, is not self-executing but depends upon the intervention of a court for enforcement- s.4 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1997.

69. In these circumstances it seems inappropriate to use language and concepts applicable to the binding orders of courts. A court generally becomes *functus officio* when it finalises all necessary decisions in relation to a case but I have not been directed to any authority which suggests that the same is necessarily true of a body such as the Tribunal, when making an administrative decision in relation to the costs of persons appearing before it. No argument has been made to suggest that the concept of re*s judicata* applies.

70. It is of relevance to note the recent case of *Richardson v Judge Mahon & Ors* [2013] IEHC 118, in which judgment was delivered by Dunne J on the 21st of March, 2013 (during the period while this judgment was reserved). This case concerned an error of fact made by the Tribunal in relation to the applicant's evidence. It had gone on to make a finding in relation to the applicant's credibility in part by reference to the erroneous finding of fact. In correspondence the Tribunal had offered to amend the misstatement despite the fact that the report had already been transmitted to the Oireachtas. It would appear, therefore, that it did not see an objection in principle to the revisiting of a mistake of fact in a published report.

71. The principle of finality of litigation has as one of its objectives the prevention of injustice to a successful litigant who has spent time and money vindicating a particular position. It would in general be unfair to compel that party to refight the same issue. That does not have any real application here. The party against whom a person in the position of the applicant would expect to recover costs if the Tribunal so ordered is the Minister for Finance, who is not represented at the hearing of the application for costs.

72. The issue that I am concerned with here is whether the ruling of March 2011 was a valid and lawful response to the applicant's request for a re-hearing in relation to costs in the light of the Supreme Court judgment. I consider that it was not, on the basis that the reasons offered either answered a different question (whether the applicant was out of time to seek judicial review) or did not properly address the issue of the Tribunal's jurisdiction.

73. This is not a finding that the applicant is entitled to his costs, or even a finding that he is entitled to a re-hearing.

74. I propose to quash the decision set out in the letter of the 20th March, 2011 and to remit the matter to the tribunal for re-consideration of the applicant's request for a re-hearing.